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JOINT APPENDIX

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IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12622

SUNSHINE BOOK COMPANY, AND SOLAIR UNION NATURISME, INC., *Appellants,*

v.

ARTHUR E. SUMMERFIELD, INDIVIDUALLY AND AS POSTMASTER GENERAL OF THE UNITED STATES, *Appellee.*

Appeal from the United States District Court for the District of Columbia

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United States Court of Appeals
For the
District of Columbia Circuit
FILED MAY 10 1955
Joseph W. Stewart
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Appeal from the United States District Court for the District of Columbia

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JOINT APPENDIX

Original Complaint

90 (Filed January 6, 1955)

UNITED STATES DISTRICT COURT

SUNSHINE BOOK COMPANY, *Plaintiff*,

—against—

ARTHUR E. SUMMERFIELD, INDIVIDUALLY AND AS POSTMASTER GENERAL OF THE UNITED STATES, *Defendant*.

107 STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

ILSLEY BOONE, being duly sworn, deposes and says that he is the President of Sunshine Book Company, the corporation named in the within entitled action; that he has read the foregoing Complaint and knows the contents thereof; and that the same is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true. Deponent further says that the reason this verification is made by deponent and not by Sunshine Book Company is because the said Sunshine Book Company is a New Jersey corporation and deponent is an officer thereof, to wit, its President.

ILSLEY BOONE

Sworn to before me, this
6th day of January, 1955.

Motion for Temporary Restraining Order

145 (Filed January 6, 1955)

Comes now plaintiff, Sunshine Book Company and moves the Court for a temporary restraining order pursuant to Rule 65(b) of the Federal Rules of Civil Procedure in the above-entitled cause restraining the defendant Arthur E. Summerfield and his agents, servants and/or employees, pending the hearing and determination of the motion filed by the plaintiff for a preliminary and permanent injunction in the above entitled case, from directly or indirectly taking any action to withhold from dispatch the February, 1955 issue of Sunshine & Health.

Dated: New York, N. Y.
January 4th, 1955.

O. John Rogge
Rogge, Fabricant & Gordon
Attorneys for Plaintiff
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Josiah Lyman
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Washington, D. C.
Tel: National 8-6158

Affidavit of O. John Rogge

146 (Filed January 6, 1955)

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

O. JOHN ROGGE, being duly sworn, deposes and says:

1. I am a member of the firm of Rogge, Fabricant & Gordon, attorneys for the plaintiff in the above entitled action and I submit this affidavit in support of the instant application by the plaintiff for a temporary restraining order pursuant to Rule 65(b) of the Federal Rules of Civil Procedure.

2. On January 6, 1955 there will be filed with this Court the verified complaint of the plaintiff herein, the plaintiff's motion for a preliminary injunction, and the supporting affidavit and exhibits in connection with said motion for a preliminary injunction.

3. The issue raised in the instant action is the validity of the steps taken by the defendant Summerfield as Postmaster General of the United States with respect to the February, 1955 issue of Sunshine & Health, a publication of the plaintiff and the direction of the said defendant, by his agents, officers, servants and/or em-
147 ployees, that the said issue of Sunshine & Health be withheld from dispatch through the United States mails.

4. The foregoing action by the defendant is stated by the local Postmaster at Mays Landing, New Jersey to be premised upon the ground that the aforesaid periodical, which is a publication published, circulated and distributed by the plaintiff to advocate the doctrine of nudism by text and photograph illustrating and describing developments in the nudist movement here and abroad, is non-mailable

under the provisions of 39 C. F. R. 36.2. That this action is in conflict with the facts and the law, and particularly in conflict with the First and Fifth Amendments to the United States Constitution, is fully set forth in the verified complaint, in the affidavit in support of the motion for a preliminary injunction, and in the memorandum of points and authorities to be submitted upon the argument. The matter contained therein is not here repeated but is incorporated by reference. At this point, the facts necessitating a temporary restraining order are set forth.

5. As appears from the verified complaint and the affidavit in support of the injunction, the defendant herein, in proceedings conducted before him and his agents, officers, and/or employees previously declared earlier issues of Sunshine & Health to be obscene, immoral and indecent and he therefore sought to apply to said publications the sanctions contained in 39 U. S. C. A. Section 259a. As further appears from the said complaint and supporting affidavit, in an action brought by the plaintiff, *inter alia*, in this Court to review the aforesaid action by the defendant allegedly pursuant to 39 U. S. C. A. Section 259a, this Court held that the said publications were not obscene, lewd or immoral and that, therefore, the action of the Postmaster General was unfounded.

148 6. The aforesaid determination by this Court was made, first in connection with a temporary restraining order by Judge Burnita Shelton Matthews of this Court, and then by Judge Henry A. Schweinhaut of this Court in granting the application for a temporary and permanent injunction.

7. By decision dated December 16, 1954, the United States Court of Appeals for the District of Columbia sustained the action of the District Court therein in granting an injunction against the defendant herein in his efforts to

apply to Sunshine & Health the sanctions of 39 U. S. C. A. Section 259a.

8. In all material respects herein, the February, 1955 issue of Sunshine & Health is substantially similar to and identical with the prior issues of Sunshine & Health which were the subject of the previous action hereinabove described.

9. Without notice and without a hearing the aforesaid local Postmaster on December 31, 1954 handed the plaintiff's president a letter stating that the aforesaid February, 1955 issue is nonmailable and must be withheld from dispatch, a copy of which letter is annexed to the complaint as Exhibit II.

10. Pursuant to the aforesaid direction and instruction of the defendant and/or his agents, officers, servants and/or employees, the local postmaster continues to withhold from the United States mails the copies of the February, 1955 issue of Sunshine & Health delivered to him.

149 11. In addition, the foregoing action of the defendant and/or his agents, officers, servants and/or employees, makes it futile for the plaintiff to submit to the said local Postmaster, or any other postmaster any copies of the February, 1955 issue of Sunshine & Health for dispatch through the United States mails.

12. In view of the foregoing, and in view of the obligation of the plaintiff to give the Attorney General and the United States Attorney for the District of Columbia five days notice of the plaintiff's motion for a preliminary injunction, it is patently impossible for the plaintiff to serve timely notice of the motion for a preliminary injunction and to be heard upon such motion and to receive relief thereon before the continued enforcement and execution of the order of the defendant as aforesaid causes the

plaintiff serious and irreparable loss and damage. The periodical of the plaintiff, as those of any other publisher of a periodical, depends upon the timeliness of the issuance of the said periodical and its circulation. Accordingly, unless the relief here sought for a temporary restraining order without notice be granted, the plaintiff will have been subjected to serious and irreparable damage as a consequence of the continued enforcement and execution of the order of the defendant as aforesaid.

13. On the other hand, however, the granting of the instant restraining order will work no hardship or prejudice on the Post Office Department. For the past twenty years or more, publications of the plaintiff, substantially similar in photographs, text, philosophy and orientation to the February, 1955 issue of Sunshine & Health have been circulated through the mails of the United States with the knowledge of the Post Office Department. It is clear that the temporary relief here sought can not possibly work any injury to the interests of the United States.

14. No previous application has been made for the relief herein sought.

(Sworn to by O. John Rogge on January 6, 1955.)

Motion for Permanent and Preliminary Injunction

151 (Filed January 6, 1955)

Comes now plaintiff, Sunshine Book Company, and moves the Court for a permanent and preliminary injunction in the above entitled cause enjoining the defendant and his servants, agents and/or employees from directly or indirectly taking any action to have the February, 1955 issue of Sunshine & Health withheld from dispatch, on the grounds that the aforesaid defendant and his agents, servants and/or employees has threatened and threatens to perform acts, unless restrained and directed by this Court as aforesaid, which will result in irreparable injury, loss and damage to the plaintiff, as more particularly appears in the verified complaint filed with this Court and in the affidavit of Rev. Ilsley Boone, and the issuance of a preliminary and permanent injunction herein will not cause undue inconvenience to the defendant but will prevent irreparable injury to the plaintiff. Unless restrained, the defendant Summerfield and his agents, servants and/or employees will withhold from dispatch the February, 1955 issue of Sunshine & Health thereby causing serious and irreparable injury to the plaintiff in violation of the

152 First and Fifth Amendments to the United States Constitution as more fully set forth in the verified complaint herein and the annexed affidavit. The plaintiff has no adequate remedy at law.

Dated: New York, N. Y.
January 4th, 1955.

O. John Rogge
Rogge, Fabricant & Gordon
Attorneys for Plaintiff
Office & P. O. Address
401 Broadway
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Suite 1125—Warner Building
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Affidavit of Reverend Ilsley Boone

153 (Filed January 6, 1955)

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

REV. ILSLEY BOONE, B. S., M. S. T., being first duly sworn on oath, deposes and says:

1. I am the Managing Editor of Sunshine & Health and President of the plaintiff, Sunshine Book Company.

2. I submit this affidavit in support of the instant application for a temporary and permanent injunction.

3. In support of the instant application for an injunction pendente lite and permanently, I respectfully refer the Court, and incorporate herein by reference, the following:

(a) The verified complaint, and the exhibits annexed thereto, in *Sunshine Book Company, et al. v. Summerfield*, C. A. 3007—53, United States District Court for the District of Columbia;

(b) The temporary restraining order in the above entitled action, dated July 2, 1954;

(c) The affidavit of O. John Rogge, Esq., dated July 1, 1954 in support of the application for the aforesaid temporary restraining order;

154 (d) The findings of fact, conclusions of law and order and judgment granting the plaintiffs in the above entitled action an injunction pendente lite and permanently;

(e) The affidavits of Rev. Charles Francis Potter, Dr. Albert Ellis, Margaret A. B. Pulis, Eugene V. Thau, and myself, and the exhibits annexed thereto submitted in support of the application for the aforesaid injunction;

(f) The opinion and decision dated December 16, 1954 of the United States Court of Appeals for the District of Columbia affirming the aforesaid judgment of the United States District Court for the District of Columbia.

4. In addition to the matter hereinbefore incorporated herein by reference, I would add only the following:

5. The February, 1955 issue of Sunshine & Health continues, by illustration and by text, to advocate the cause of nudism in a manner substantially identical with that which appeared in the issues of Sunshine & Health which were the subject of the prior action against the defendant.

6. The action of the defendant in attempting to withhold the February, 1955 issue of Sunshine & Health from the United States mails represents a bald attempt to circumvent prior determinations that the issues of Sunshine & Health are not obscene and that the publisher and disseminator thereof may not be denied the use of the United States mails. While, of course, the February, 1955 issue of Sunshine & Health has different text and different pictures from p ior issues, the fact is that for purposes of the Postmaster General and his functions, the February,
155 1955 issue is no more obscene or unlawful than the prior issues which have been held to be not in violation of prevailing notions or standards of decency or morality.

7. The action of the defendant herein complained of, is even more damaging and prejudicial to the plaintiff than his previous abortive attempts to close the mails to the plaintiff and its publications.

8. The only remedy which the Postmaster General affords the plaintiff is, after the event, a so-called hearing

which is in fact not a hearing, before the hearing examiner, as past experience shows, will accept none of the plaintiff's evidence on what constitutes community standards of decency or morality or accepted practices pertaining to nudism in various fields of American life.

9. The aforesaid action of the Postmaster General is, in still another respect, more prejudicial than that unsuccessfully attempted by him under 39 U. S. C. A. Section 259a. For here, there is no statutory authority, and under the Constitution there could be none, permitting the Postmaster General to take the action which he here proposes to take.

10. And, moreover, it will be observed that the action here proposes to wholly eliminate from the mails of the United States any copies of the February, 1955 issue; if the Postmaster General is correct in his contention that he is authorized to determine whether the matter is
156 nonmailable, and then excludes it from the mails if he so finds, then the plaintiff will be wholly unable to disseminate or circulate through the United States mails any copies of the February, 1955 issue of Sunshine & Health.

11. Finally, it will be observed that the Postmaster General seeks to take the above described steps although, in substance, this Court has previously adjudicated that publications substantially identical with the February, 1955 issue of Sunshine & Health are not obscene and are not immoral and indecent. If the Postmaster General can thus require the plaintiff to litigate and relitigate each month whether the particular issue of its publication is or is not obscene, and delay the dissemination of that issue in the United States mails pending such determination, then

the Postmaster General will have thereby effectively foreclosed the United States mails to the plaintiff's publication, although it has been competently adjudicated that such publication does not offend decency or morality.

12. In the circumstances, it is respectfully submitted, that the action of the defendant, as well as the action threatened by him, causes the plaintiff immediate and irreparable loss and damage in violation of the First and Fifth Amendments to the United States Constitution; and as the action of the defendant has such immediate effect, and as there is not available any statutory mode of judicial relief from the action of the defendant, the injunction herein sought should be granted without requiring an exhaustion of any alleged administrative remedies.

157 13. No previous application has been made for the relief herein sought.

(Sworn to by Ilsley Boone on January 4, 1955.)

Notice of Motion for Preliminary and Permanent Injunction

158 (Filed January 6, 1955)

To the United States Attorney for the District of Columbia, Attorney for Defendant:

PLEASE TAKE NOTICE that the undersigned will bring the attached motion for a preliminary and permanent injunction upon the basis of said motion, the affidavits in support thereof, the verified complaint filed with this Court, and the annexed points and authorities, on for hearing before this Court at the United States District Courthouse for the District of Columbia on the day of January, 1955 at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard.

O. JOHN ROGGE
ROGGE, FABRICANT & GORDON
Attorneys for Plaintiffs
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Washington, D. C.

Supplemental Affidavit of Reverend Ilsley Boone

159 (Filed January 6, 1955)

DISTRICT OF COLUMBIA)ss.:

REV. ILSLEY BOONE, B. S., M. S. T., being first duly sworn on oath, deposes and says:

1. I am the Managing Editor of Sunshine & Health and President of the plaintiff, Sunshine Book Company.

2. On Wednesday, January 5, my attorney, Mr. O. John Rogge, and I had a conference with attorneys in the Post Office Department in order to attempt to persuade them that the Postmaster General should recede from the position which he had taken with reference to the February 1955 issue of Sunshine & Health. After presenting our position my attorney arranged with them to telephone at ten a.m. on Thursday January 6 to get their answer. When he telephoned at the appointed hour we were asked to come to the Post Office Department at 11 a.m. the same morning. When we did so we were each handed a letter advising us of a hearing at 10 a.m. on January 10, 1955 with reference to the mailability of the February, 1955 issue, a copy of which said letter is attached to this affidavit.

160 3. The proposed hearing is of no relief to the plaintiff nor will it alter the irreparable damage the plaintiff is about to suffer. If the plaintiff has to wait for a final administrative determination in advance of mailing its publication will be dead long before any such determination comes to hand.

4. Moreover, the plaintiff participated in such a hearing with reference to the twenty-five issues from March, 1951

to March, 1953 of Sunshine & Health and at that so-called hearing the hearing examiner refused to accept the plaintiff's evidence. The plaintiff offered to produce expert testimony relating to the issue of the charged obscenity of the publications for the purpose of proving that nudism and the advocacy of nudism by text and illustration as in the publications did not violate community standards of decency or morality, or accepted practices pertaining to nudism in the fields of art, science, biology, sociology, etc., and that the advocacy of nudism by text and picture as in the publications tended to improve rather than deteriorate or corrupt the morality of the readers of said publications. The motion of respondents to offer and introduce the aforesaid expert testimony was denied over their objection by the Hearing Examiner.

5. I am advised by my attorney that the hearings of the Post Office Department are still of the same nature as the one in which the plaintiff participated and that at such hearings the Hearing Examiner will receive in evidence nothing else than the publication and the use or attempted use of the mails.

ILSLEY BOONE

Letter Annexed to Foregoing Affidavit of Reverend Ilsley Boone

161 January 6, 1955.

Mailability of February, 1955 issue of
"Sunshine & Health Magazine as affected by
Title 18 U. S. Code, Section 1461.

Assistant Solicitor, WCO'B:Omd
Mailability Division. H.E. Doc. 3/103

Sunshine and Health,
Sunshine Book Company,
Box 1000,
Mays Landing, New Jersey.

Please take notice that a hearing will be held at 10 o'clock a.m. on January 10, 1955, in the Post Office Department, Washington, D. C., Hearing Room 3237, before Mr. James C. Haynes, Jr., Chief Trial Examiner, to determine the mailability of the February, 1955 issue of Sunshine and Health magazine, copies whereof are now being withheld from dispatch by the Postmaster at Mays Landing, New Jersey, pursuant to instructions issued to him by the Solicitor for the Post Office Department, copy attached. The postmaster's letter to you dated December 31, 1954, copy also attached, advises you of the availability of a hearing but erroneously states that the Solicitor had already made a determination of nonmailability with respect to the magazine, no ruling or determination either of mailability or nonmailability having yet been made by the Solicitor or by any person authorized to do so by or in behalf of the Post Office Department. The Chief Hearing Examiner's initial decision and recommendation will be subject to appeal to the Solicitor for the Post Office Department to whom the Postmaster General has delegated the authority to make a final decision for the Department.

Please also take notice that every effort will be made to insure an expeditious consideration and ruling in this matter.

/s/ William C. O'Brien

Affidavit of the Solicitor for the Post Office Department

162 (Filed January 14, 1955)

ABE MCGREGOR GOFF, being first duly sworn, says:

That he is the Solicitor for the Post Office Department;

That he is authorized by the Postmaster General to make decisions on his behalf with regard to the application of the provisions of Title 18 United States Code, Section 1461, to any matter offered for mailing and to instruct postmasters with respect to the acceptability or nonacceptability of any such matter for mailing and conveyance or delivery thereof from any post office or by any letter carrier;

That there is pending before the Post Office Department the question whether the February, 1955 issue of a publication entitled "Sunshine & Health" and the January-February, 1955 issue of "SUN", ("Solaire Universelle Nudisme") copies whereof have been deposited for mailing at the post office at Mays Landing, New Jersey, should be accepted for mailing;

That the publishers and mailers of said publications were duly notified in writing that a hearing would be
163 held before a Hearing Examiner for the Post Office Department on the aforesaid question of mailability of the magazines, the hearing in "Sunshine & Health" having been scheduled for 10 a.m. on January 10, 1955, and the hearing on "SUN" having been set for 2 p.m. on January 11, 1955;

That counsel representing both publications, Mr. O. John Rogge, appeared before the Honorable James R. Kirkland, Judge of the United States District Court for the District of Columbia, on Friday January 7, 1955, and having been denied a requested temporary restraining order, and the court also having refused to direct the Post Office Depart-

ment to postpone the aforesaid hearing on "Sunshine & Health", thereupon requested the Assistant Solicitor, Mr. O'Brien, to agree to postpone said hearings. Mr. O'Brien submitted the question to affiant. Mr. Rogge presented the request to affiant who first agreed to postpone the respective hearing dates to January 13 and 14, 1955; but upon further request of Mr. O. John Rogge, in behalf of the aforesaid publications, affiant agreed to a further postponement of the hearings until January 17, 1955, it being thereupon understood that Mr. Rogge would request the Court to postpone further hearing in this suit until January 18, 1955, or such date thereafter as might be so designated by the Court;

That affiant has requested that the proceeding before this Department be expedited as much as possible for the benefit of the respondent publications, and having considered the various steps of the proceedings, including hearing, initial decision and appeal therefrom by either party to the controvery, affiant is of the opinion that a final agency ruling can be made in ten days from the com-
164 mencement of the hearing, unless the publishers cause further delay in the proceedings.

(Sworn to by Abe McGregor Goff on January 13, 1955.)

Second Supplemental Affidavit of Ilsley Boone

165 (Filed January 18, 1955)

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

ILSLEY BOONE, being first duly sworn deposes and says that:

1. He is President of the Sunshine Book Company one of the plaintiffs in the above-entitled action.

2. He and his publications and Sunshine Book Company have been subjected to various proceedings before the Post Office Department.

3. One of the proceedings against Sunshine Book Company and the magazine Sunshine & Health began on or about April 7, 1948 and involved the May 1948 issue of Sunshine & Health. Subsequently this proceeding was enlarged to include the July, August, September, and October 1948 issues. This proceeding continued from time to time before an examiner of the Post Office Department until it was dismissed on May 10, 1951 more than three years after its inception. The order dismissing the
166 proceeding was entered at the request for such dismissal by the Associate Solicitor of the Post Office Department. During all this period of three years and more the proceedings never got beyond the Examiner of the Post Office Department.

4. A second proceeding against Sunshine Book Company and its publication Sunshine & Health was begun on or about September 23, 1952 and is now, after more than two years, pending in the Court of Appeals for the Dis-

trict of Columbia Circuit. *Summerfield* v. *Sunshine Book Company et al.* No. 12026. By motion dated December 31, 1954 the appellants in the aforesaid proceeding moved for a stay of the issuance of the mandate to and including January 29, 1955 for the reason that the Solicitor General of the United States has not yet determined whether a petition for a writ of certiorari will be filed in the United States Supreme Court. On January 11, 1955 Chief Justice Stevens of the United States Court of Appeals of the District of Columbia Circuit granted the motion and ordered that the mandate be stayed to and including January 29, 1955.

5. Thus in the many proceedings by the Post Office Department against deponent and against Sunshine Book Company and against various of the publications with which deponent is associated in one capacity or another, there were two of these proceedings, one of which lasted for more than three years, and a second which has been going more than two years and the point in the latter proceeding at which there will be a final determination is not yet in sight.

(Sworn to by Ilsley Boone on January 14, 1955.)

Amended Complaint

167 (Filed January 18, 1955)

The plaintiffs, by their attorneys, Rogge, Fabricant & Gordon, and Josiah Lyman respectfully show to this Court and allege for their complaint:

AS AND FOR A FIRST, SEPARATE AND DISTINCT CLAIM

First: This is an action for a declaratory judgment and for equitable relief arising under the Constitution and the laws of the United States and involves a matter in controversy which exceeds the sum or value of $3,000. exclusive of interest or costs.

Second: The jurisdiction of the Court in this action arises under §§11-301, 11-305, and 11-306 of the District of Columbia Code, §§1331 and 2201 of Title 28 of the United States Code, and §1009 of Title 5 of the United States Code.

Third: The defendant Summerfield is the Postmaster General of the United States and is found within the District of Columbia.

168 Fourth: The plaintiff Sunshine Book Company is a non-profit New Jersey corporation and is the publisher of a monthly periodical publication entitled "Sunshine & Health" which has had and has a wide circulation both nationally and locally and has been and is being distributed nationally to the forty-eight states both by means of the United States mails and interstate commerce. It has been published and distributed continuously for more than twenty years. Sunshine & Health is an educational and cultural publication which contains discussions relating to various social ideas, including ideas relating to

nudism. In its pages are inquiries as to whether human beings would be healthier, physically, mentally and emotionally, if they practiced nudism. It has published discussions on such subjects as fear in human beings, the value of differences of opinion, the variety of opinion as to nudism, humanism, the non-obscenity of nudist pictures, the legal and constitutional rights of persons practicing nudism, the law relating to nudist publications, the bondage of clothing, solar ray therapy, health, vitamins, the effect of nudism on children, sex education in schools, and the Bible and clothing; news of nudist conventions, international, national, regional and local, the activities of various nudist camps such as the construction of new buildings, the completion of swimming pools and tennis and volley ball courts, the building of an outdoor fireplace, the digging of a new well and, in general, the work underway for the improvement of old clubs and the construction of quarters for new ones, and personal and social notes
169 as to individual members of various nudist organizations; reports of speeches at, and minutes of, nudist conventions, and minutes of board and business meetings of various nudist groups; greetings from various nudist groups, directories of nudist clubs affiliated with the American Sunbathing Association, Inc., and of new clubs forming; accounts of the growth of the nudist movement; and suggestions for further psychological, sociological and philosophical studies. It has published articles by psychiatrists, psychologists, social workers, doctors and ministers.

Fifth: The plaintiff Solair Union Naturisme, Inc. is a non-profit New Jersey corporation and is publisher of a bi-monthly publication entitled "Sun" which is the official publication of said corporation. Solair Union Naturisme, Inc. is an international, interlingual, interracial associa-

tion representing the naturist movement all over the world and all levels of nudist organizations, individual, group, regional, national and international. Sun Magazine is the same type of publication as Sunshine & Health except that it is on an international scale. In its pages have appeared reports on, and news of, the nudist movement in foreign countries; reports and greetings from various nudist groups in foreign countries and from individual members of such groups; a world directory of nudist groups and organizations; accounts of the first international conferences of nudism, which were held in 1951; and an article on, and the provisions of, the UNESCO agreement guaranteeing freedom of the press. The reports and articles which have appeared in Sun Magazine have been in various languages, including English, both in translation and as originally written, French, and German, as well as Esperanto.

170 Sixth: In each of the publications as aforesaid pictures illustrate the text, the publishers taking the view that illustrations depict better than words can describe the natural and normal life, and the beautiful and healthful methods and activities of a nude society. The text of these publications has repeatedly received commendation as an elucidation of the principles of the nudist movement. The pictures are a mirror to the text and reflect areas of thought entirely consonant with and supplementary to the textual narrative. They are simply pictures of nudists in a normal and healthy environment, in the happy enjoyment of thoroughly innocent activities. They are the antithesis of anything suggestive or pornographic. Some of them are not without positive artistic merit and all of them present the human form in accordance with the conceptions of nudists as to the most harmonious relationship between human beings and the earth. They thus become an appropriate antidote to a distinctly different type of picture notorious for its salacious quality while escaping punitive legality by the presence of a skimpy

frill covering less than a dozen square inches of the human body.

Seventh: The publication Sunshine & Health has been published and circulated and distributed through the mails of the United States and abroad for a period of time in excess of twenty-three years. The publication Sun Magazine is now in its fourth year of publication and during the entire period of its existence has been published and circulated and distributed through the mails of the United States and abroad. Upon information and belief
171 at no time during the aforesaid period of publication, distribution and circulation of the aforesaid publications has any of the publishers, thereof been indicted or otherwise criminally charged with or convicted for the publication, circulation, distribution or receipt of said publications through the United States mails under any of the appropriate federal criminal statutes governing the circulation, distribution or receipt through the United States mails of obscene, lewd, lascivious or fraudulent matter.

Eighth: On or about September 23, 1952 the then Solicitor for the Post Office Department of the United States filed a complaint, allegedly pursuant to 39 U. S. C. §259a, alleging that the respondents therein named, including "Sunshine Book Co., Sunshine Book Company, Sunshine & Health, Solar Union Naturisme, Inc., and Solaire Universelle De Nudisme, at Mays Landing, New Jersey" were conducting an unlawful enterprise through the United States mails in that they were said to be selling and offering for sale through the said mails the aforesaid publications Sunshine & Health and Sun Magazine. The said complaint recommended that the Postmaster General of the United States issue an order to the Postmaster at

Mays Landing, New Jersey to dispose of mail addressed to, and money orders drawn in favor of the above-mentioned respondents, and their agents and representatives as such.

Ninth: On or about December 4, 1952, the then Solicitor for the Post Office Department of the United States filed a complaint, allegedly pursuant to 39 U. S. C. §259a, alleging that the respondents therein named, including
"Commercial Distributors, Inc., M. Brotherton,
172 and Post Office Box BB at Spring Lake, New Jersey,
and Sunshine Book Company at Egg Harbor City, New Jersey, and Post Office Box 1000 at Mays Landing, New Jersey" were conducting an unlawful enterprise through the United States mails in that they were said to be selling and offering for sale through the said mails the publications "The Story of American Nudism" "Sun Magazine" and "Sunshine & Health". The said complaint recommended that the Postmaster General of the United States issue orders to the postmasters at Spring Lake, New Jersey, Egg Harbor City, New Jersey and Mays Landing, New Jersey, to dispose of mail addressed to, and money orders drawn in favor of the above-mentioned respondents, and their agents and representatives as such.

Tenth: The respondents named in the complaint as aforesaid duly filed answers to the charges.

Eleventh: By agreement of the parties, hearing on the two aforesaid complaints was consolidated and a hearing was conducted before the Hearing Examiner of the Post Office Department of the United States on the aforesaid charges on or about February 16, 1953.

Twelfth: At the said hearing, by stipulation, there were received in evidence 25 issues of Sunshine & Health from

the March 1951 issue to and including the March, 1953 issue; and 7 issues of Sun Magazine beginning with the January-February, 1952 issue and ending with the March-April, 1953 issue. Apart from the publications themselves, which were admitted in evidence by stipulation, the Post Office Department offered no other proof or evidence to sustain its charges against respondents as aforesaid.

173 Thirteenth: At the aforesaid hearing the respondents therein offered to produce expert testimony relating to the issue of the charged obscenity of the aforesaid publications for the purpose of proving that nudism and the advocacy of nudism by text and illustration as in the aforesaid publications did not violate community standards of decency or morality, or accepted practices pertaining to nudism in the fields of art, science, biology, sociology, etc., and that the advocacy of nudism by text and picture as in the aforesaid publications tended to improve rather than deteriorate or corrupt the morality of the readers of said publications. The motion of respondents at that hearing to offer and introduce the aforesaid expert testimony was denied over their objection by the Hearing Examiner.

Fourteenth: On or about March 27, 1953 the Hearing Examiner made his initial decision upon the aforesaid charges and held that while the written material in the aforesaid publications is not obscene, lewd, lascivious or indecent, some of the photographs therein contained of nude men and women were said to be objectionable within the meaning of 39 U. S. C. §259a and it was concluded that the named respondents "are in violation of 39 U. S. C. 259a as charged in the complaint" and the said Examiner recommended an order for execution by the Postmaster General of the United States for the denial of the use of

the United States mail by the respondents for the receipt of any communications or transmittals through such mails.

Fifteenth: Pursuant to the applicable rules and regulations of the Post Office Department of the United States the respondents in the aforesaid proceeding duly appealed from the aforesaid determination of March 27, 1953 by the Hearing Examiner to the Postmaster General of the United States.

174 Sixteenth: On or about June 23, 1953 the Postmaster General, by decision and order of said date, concurred in the finding of the Hearing Examiner as aforesaid. The order of the Postmaster General of the United States of June 23, 1953 as aforesaid instructed the local postmasters at Mays Landing, Spring Lake, and Egg Harbor City, New Jersey, that the respondents in the proceeding before the aforesaid Postmaster General of the United States were using the mails in violation of 39 U. S. C. 259a and forbade said local postmasters "to pay any postal money order drawn to the order of said respondents and further directed the said local postmasters to inform the remitter of any such postal money order that payment thereof has been forbidden" and the said local postmasters were further instructed by the defendant, Postmaster General of the United States, "to return all letters, whether registered or not, and other mailed matter which shall arrive at your office directed to the said" respondents "to the postmasters at the offices at which they were originally mailed, to be delivered to the senders thereof with the words 'Unlawful; Mail to this address returned by order of the Postmaster General' plainly written or stamped upon the outside of such letters or matter."

Seventeenth: On or about July 2nd, 1953, the respondents in the proceedings hereinbefore described initiated an action in this Court for a declaratory judgment and for injunctive relief against the defendant herein, the Postmaster General of the United States, by filing with this Court a verified complaint bearing Index No. C. A. 3007—53. That complaint and the exhibits annexed thereto are incorporated herein by reference and made a part hereof as if more fully set forth herein.

175 Eighteenth: The aforesaid complaint alleged that the action of the defendant as aforesaid was arbitrary, capricious and unlawful in that it was unsupported by any evidence, unwarranted by the facts, not based on any competent judicial determination concerning the charged lewdness or obscenity of the aforesaid publications and was otherwise without basis in law or fact, the publications upon which the aforesaid action was premised being neither in whole nor in part obscene, lewd, lascivious, corrupt, indecent or immoral, but rather that said publications were a fair and honest presentation and advocacy in words and by photographs of the doctrine of nudism. The action of the defendant as aforesaid and Section 259a of Title 39 of the United States Code, as applied as aforesaid by the defendant, were alleged in the aforesaid complaint to be unlawful and unconstitutional. Section 259a of Title 39 as applied by the Postmaster General would have enabled him to exercise a prior restraint and censorship over freedom of expression in violation of the First Amendment to the United States Constitution. Furthermore, as applied by the Postmaster General, this section employed criteria and standards for the determination of obscene material and the imposition of severe penalties therefor which standards were vague, nebulous, subjective and impossible of objective determination and

application in violation of the First Amendment to the United States Constitution and the Due Process Clause of the Fifth Amendment to the United States Constitution; it provided for penalties which were not reasonably or fairly related to the apprehended evil in violation of the Due Process Clause of the Fifth Amendment
176 to the United States Constitution; and it failed to provide for a fair, impartial and judicial hearing to the charged parties in violation of the Due Process Clause of the Fifth Amendment to the United States Constitution.

Nineteenth: On or about July 2, 1953, Judge Burnita Shelton Matthews granted the application of the plaintiffs in Civil Action 3007—53 for a temporary restraining order pursuant to Rule 65(b) of the Federal Rules of Civil Procedure, pending the hearing and determination of the motion filed therein by the plaintiffs in that action for a preliminary injunction, from directly or indirectly taking any action to execute, enforce or implement the aforesaid orders of the defendant of June 23, 1953.

Twentieth: Thereafter on or about July 13, 1953, Judge Henry A. Schweinhaut found that the publications as aforesaid were not obscene, that they did not come within 39 U. S. C. A. §259a, that the orders of the defendant of June 23, 1953 as aforesaid were invalid, and, therefore, enjoined the defendant from enforcing, implementing or taking any action based upon the aforesaid orders of the defendant of June 23, 1953.

Twenty-first: Thereafter the defendant caused an appeal to be taken to the United States Court of Appeals for the District of Columbia on the aforesaid order and judgment of Judge Schweinhaut as aforesaid (the said appeal was docketed as No. 12026 in the aforesaid Court of Appeals),

and the papers and proceedings had therein are incorporated herein by reference as if more fully set forth herein.

177 Twenty-second: By decision dated December 16, 1954, the United States Court of Appeals for the District of Columbia Circuit affirmed the order and judgment of the United States District Court for the District of Columbia as aforesaid.

Twenty-third: By motion dated December 31, 1954, the defendant in the aforesaid action moved the United States Court of Appeals for the District of Columbia Circuit for a stay of the issuance of the mandate theretin to and including January 29, 1955 for the reason that the Solicitor General of the United States has not as yet determined whether a petition for writ of certiorari will be filed in the United States Supreme Court.

Twenty-fourth: On or about December 23, 1954, the printing of the February, 1955 issue of the publication, Sunshine & Health was completed; of roughly 40,000 copies printed, approximately 10,000 copies of the said issue were to be circulated as aforesaid. A copy of the said issue is annexed hereto and made a part hereof as Exhibit I.

Twenty-fifth: The aforesaid February, 1955 issue of Sunshine & Health, as fully described in paragraphs "Fourth", "Sixth", "Seventh", "Twelfth", and "Thirteenth" hereof, is, in its pictures, text, philosophy, and orientation substantially similar to and identical with the prior issues of Sunshine & Health and particularly those issues referred to in paragraph "Twelfth" hereof, copies of which issues referred to in said paragraph "Twelfth" are annexed to the Complaint in Civil Action 3007—53,

which said copies are incorporated herein by reference and made a part hereof as if more fully set forth herein.

178 Twenty-sixth: From and after December 24, 1954 to and including December 31, 1954, the plaintiff Sunshine Book Company caused to be submitted 400 copies of the aforesaid issue to the Mays Landing, New Jersey Post Office, for mailing as third class matter, pursuant to section 235, Title 39 of the United States Code.

Twenty-seventh: Upon information and belief from December 27, 1954 to December 31, 1954, without notice or hearing to the plaintiff, Sunshine Book Company, the local postmaster of the aforesaid Mays Landing Post Office, upon direction and instruction of the defendant herein and/or his officers, servants, agents and/or employees, failed, neglected and refused to mail as third class matter, the copies of the February, 1955 issue of Sunshine & Health submitted to him as aforesaid for such mailing.

Twenty-eighth: On or about December 31, 1954, the aforesaid local postmaster, pursuant to direction and instruction of the defendant, and/or his servants, agents, officers and or employees, served upon the plaintiff, Sunshine Book Company, herein a notice that the said local postmaster had been requested by the Solicitor of the Post Office Department to inform the plaintiff that the aforesaid February, 1955, issue of Sunshine & Health is "nonmailable and must be withheld from dispatch". A copy of the aforesaid notice is annexed hereto, made a part hereof, as Exhibit II.

Twenty-ninth: The aforesaid notice stated that the plaintiff, Sunshine Book Company, "may have an opportunity to show cause within fifteen days why the article

should not be disposed of as matter nonmailable
179 under the provisions of 39 CFR 36.2, by offering through appearance at the office of the Solicitor, Post Office Department, Washington, D. C. in person or by attorney, or through submission of a statement in writing, whatever evidence or arguments you care to submit. If additional time is required, application therefor should be made to the Solicitor."

Thirtieth: The notice dated December 31, 1954 as aforesaid does not specify the precise grounds upon which it has been determined that the February, 1955 issue of Sunshine & Health is nonmailable; nor does the said notice advise the plaintiff, Sunshine Book Company, of the exact time and place of the hearing proposed in the said notice of December 31, 1954.

Thirty-first: On January 6, 1955 representatives of the defendant Summerfield handed to the president of the plaintiff, Sunshine Book Company, a notice of a hearing to be held on January 10, 1955 "to determine the mailability of the February, 1955 issue of Sunshine and Health magazine, copies whereof are now being withheld from dispatch by the Postmaster at Mays Landing, New Jersey, pursuant to instructions issued to him by the Solicitor of the Post Office Department", a copy of which said notice is attached to this amended complaint and made a part thereof as Exhibit 3.

Thirty-second: On the same date, January 6, 1955 the agents of the defendant Summerfield mailed to the plaintiff, Solar Union Naturisme, Inc., a notice of a hearing to be held on January 11, 1955 "to determine the mailability of the January-February, 1955, issue of the
180 publication entitled Solaire Universelle Nudisme Magazine, under the provisions of Title 18 United

States Code, Section 1461", a copy of which said notice is attached to this amended complaint and made a part thereof as Exhibit 4. A copy of the January-February 1955 issue of the publication entitled Solaire Universelle de Nudisme Magazine, popularly known as Sun Magazine is attached to this amended complaint and made a part thereof as Exhibit 5.

Thirty-third: The aforesaid January-February 1955 issue of Sun Magazine, as fully described in Paragraphs "Fifth", "Sixth", "Seventh", "Twelfth", and "Thirteenth" hereof is in its pictures, text, philosophy, and orientation substantially similar to and identical with the prior issues of Sun Magazine and particularly those referred to in Paragraph "Twelfth" hereof, copies of which issues referred to in said Paragraph "Twelfth" are annexed to the complaint in Civil Action No. 3007—53, which copies are incorporated herein by reference and made a part hereof as if more fully set forth herein.

Thirty-fourth: Approximately 25% of the total distribution of about 40,000 copies per month of Sunshine & Health are distributed by means of the United States mails. This percentage of 25% for distribution through the United States mails has been true continously for the past 20 years and would apply to the February 1955 issue, copies of which were ordered by the defendant to be withheld from dispatch in the United States mails. During the entire period of the existence of Sun Magazine approximately 30% of its total circulation has been distributed by means of the United States mails. That percentage is true of the January-February 1955 issue.

181 Thirty-fifth: In the United States today the life of dated periodical publications depends on their prompt dissemination through the United States mails and

the Post Office Department has long recognized the importance of the use of the mails for the prompt circulation of periodical publications.

Thirty-sixth: In the United States today the life of periodical publications depends on their prompt circulation through the United States mails, and for two reasons: In the first place the dissemination through the United States mails must be prompt, for any delay in distribution of a dated periodical publication means the death of this issue; in the second place periodical publications depend for their continued existence on dissemination through the United States mails for they receive a larger percentage of return on copies so disseminated to subscribers than on the copies distributed by other means such as those distributed by means of news-stands.

Thirty-seventh: The action of the defendant Summerfield and his agents, servants and/or employees as hereinabove recited is arbitrary, capricious and unlawful in that it is unsupported by any evidence, unwarranted by the facts, not based upon any competent judicial determination concerning the non-mailability of the aforesaid publications, and is otherwise without basis in law or fact, the publications upon which the aforesaid action is premised being neither in whole nor in part obscene, lewd, lascivious, corrupt, indecent or immoral but said publications are instead a fair and honest presentation and advocacy in words and by photographs of the nudist movement.

182 Thirty-eighth: The action of the defendant Summerfield and his agents, servants and/or employees is unlawful and unconstitutional in that it is not founded upon any competent statutory or other authority.

Thirty-ninth: The action of the defendant Summerfield and/or his agents, officers, servants and/or employees and/or 39 C. F. R. 36.2, and/or 18 U. S. C. A. §1461, as applied as aforesaid by the defendant, is unlawful and unconstitutional in that it authorizes the Postmaster General to exercise a prior restraint and censorship over freedom of expression in violation of the First Amendment to the United States Constitution; it employs criteria and standards which are vague, nebulous, subjective and impossible of objective determination and application in violation of the First Amendment to the United States Constitution and the Due Process Clause of the Fifth Amendment to the United States Constitution; and it fails to provide for a fair, impartial and judicial hearing to the charged parties in violation of the Due Process Clause of the Fifth Amendment to the United States Constitution.

Fortieth: There exists between the plaintiffs and the defendant herein an actual controversy and the plaintiffs have instituted this action for the purpose, among others, of having the aforesaid action of the defendant and/or his servants, agents and or employees, as aforesaid, and/or the regulation as applied herein, declared unconstitutional as hereinabove more particularly set forth.

Forty-first: The action of the defendant Summerfield and or his agents, servants, officers and/or employees, as aforesaid, has caused and will continue to cause serious and irreparable damage to the planitiffs herein,
and to all others similarly situated, in that the
183 threatened enforcement of the order of the defendant Summerfield, as aforesaid, by him and his agents, servants and or employees will have the effect of making it impossible for the plaintiffs and others similarly situated to use the mails of the United States for the purpose of effectively disseminating to the people of the

United States and abroad publications and other literature advocating the doctrine of nudism and informing such people of activities and developments in the nudist movement here and abroad, thereby restraining and inhibiting the plaintiffs in the exercise of their constitutional rights of freedom of speech, press, assembly and association.

Forty-second: A delay in ascertaining and determining the rights of plaintiffs as aforesaid will result in further serious and irreparable loss and damage to them, and this loss and damage are and will be irremediable unless relief is granted by this Court.

Forty-third: By reason of the premises, plaintiffs are entitled to relief against the defendant under the Temporary Declaratory Judgment Act of June 14, 1934 (28 U. S. C. A. Section 2201), the Federal Administrative Procedure Act of 1946 (5 U. S. C. A. Section 1009), and under the Constitution of the United States.

AS AND FOR A SECOND, SEPARATE AND DISTINCT CLAIM

Forty-fourth: Plaintiffs repeat and reallege each and every allegation contained in paragraphs "First" through "Forty-second" with the same force and effect as if set forth at length herein.

184 Forty-fifth: The defendant Summerfield and his servants, officers, agents and/or employees have ordered the February, 1955 issue of Sunshine & Health and the January-February 1955 issue of Sun Magazine to be withheld from dispatch, and the said defendant and his agents, servants and/or employees will enforce that determination and order unless and until the defendant, his servants, agents, officers and/or employees are enjoined

and restrained from withholding the aforesaid issues from dispatch in the United States mails.

Forty-sixth: The plaintiffs herein have no adequate remedy of law.

WHEREFORE, plaintiffs pray for the following relief:

1. That the aforesaid determination and order of December 31, 1954 of the defendant Summerfield and/or his servants, agents, officers, and/ employees herein and/or 39 C. F. R. 36.2 as applied by the defendant, and/or his servants, agents, officers and/ employees, be declared invalid and in violation of the First and Fifth Amendments to the United States Constitution;

2. That the defendant Summerfield and/or his agents, servants, officers and/or employees be enjoined and restrained permanently from withholding from dispatch in the United States mails the February 1955 issue of Sunshine & Health and the January-February 1955 issue of Sun Magazine, and that they be further enjoined and restrained permanently from withholding from dispatch in the United States mails further numbers of these
185 publications which are substantially similar to the issues involved in this proceeding and the issues ruled by Judge Henry A. Schweinhauf of this Court to be not obscene in *Sunshine Book Company et al.* v. *Summerfield*, C. A. 3007/53.

3. That pending the final hearing and determination of the amended complaint on its merits, and that pending the hearing on the motion of the plaintiffs for a preliminary injunction the defendant Summerfield and/or his agents, servants, officers and or employees be enjoined and restrained permanently from withholding dispatch in the United States mails further numbers of these publications

which are substantially similar to the issues involved in this proceeding and the issues ruled by Judge Henry A. Schweinhaut of this Court to be not obscene in *Sunshine Book Company et al.* v. *Summerfield*, C. A. 3007/53.

4. That the February 1955 issue of Sunshine & Health and the January-February 1955 issue of Sun Magazine be adjudged and declared to be not obscene.

5. For such other and further relief as to this Court may seem just and proper.

O. John Rogge
Rogge, Fabricant & Gordon
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Suite 1125—Warner Bldg.
Washington, D. C.

Josiah Lyman
501—13th Street, N.W.
Washington, D. C.
Tel: National 8-6158

186 STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

ILSLEY BOONE, being duly sworn, deposes and says that he is the President of Sunshine Book Company, one of the corporation plaintiffs named in the within entitled action; and secretary and editor of Solar Union Naturisme, Inc., the other corporation named in the within entitled action that he has read the foregoing amended complaint and knows the contents thereof; and that the same is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true. Deponent further says that the reason this verification is made by deponent and not by the plaintiffs is because the plaintiffs are New Jersey corporations and deponent is an officer thereof.

ILSLEY BOONE

Sworn to before me, this
14th day of January, 1955.

FREDA D. MAISEL
Notary Public, State of N. Y.
No. 03-7676200
Qual. in Bronx Co. Cert. filed
with Bronx County Register
Term expires March 30, 1956

Exhibit II Annexed to Amended Complaint

275 (Filed January 18, 1955)

UNITED STATES POST OFFICE
Mays Landing, N. J.
December 31, 1954.

Sunshine and Health,
Box 1000,
Mays Landing, N. J.

Dear Sirs:

I have been requested by the Solicitor of the Post Office Department to inform you that the February, 1955 issue of "Sunshine and Health" is nonmailable and must be withheld from dispatch.

You may have an opportunity to show cause within fifteen days why the article should not be disposed of as matter nonmailable under the provisions of 39 CFR 36.2, by offering through appearance at the office of the Solicitor, Post Office Department, Washington, D. C. in person or by attorney, or through submission of a statement in writing, whatever evidence or arguments you care to submit. If additional time is required, application therefore should be made to the Solicitor.

Very truly yours,

/s/ E. J. Turpin.
E. J. Turpin,
Postmaster.

Exhibit 3 Annexed to Amended Complaint

276 (Filed January 18, 1955)

Mailability of February, 1955 issue of "Sunshine & Health magazine as affected by Title 18 U. S. Code, Section 1461.

January 6, 1955.

WCO'B:omd
H.E. Doc. 3/103

Assistant Solicitor,
Mailability Division.

Sunshine and Health,
Sunshine Book Company,
Box 1000,
Mays Landing, New Jersey.

Please take notice that a hearing will be held at 10 o'clock a.m. on January 10, 1955, in the Post Office Department, Washington, D. C., Hearing Room 3237, before Mr. James C. Haynes, Jr., Chief Trial Examiner, to determine the mailability of the February, 1955 issue of Sunshine and Health magazine, copies whereof are now being withheld from dispatch by the Postmaster at Mays Landing, New Jersey, pursuant to instructions issued to him by the Solicitor for the Post Office Department, copy attached. The postmaster's letter to you dated December 31, 1954, copy also attached, advises you of the availability of a hearing but erroneously states that the Solicitor had already made a determination of nonmailability with respect to the magazine, no ruling or determination either of mailability or non-mailability having yet been made by the Solicitor or by any person authorized to do so by or in behalf of the Post Office Department. The Chief Hearing Examiner's initial decision and recommendation will be subject to appeal to the Solicitor for the Post Office Department to whom the Postmaster General has delegated the authority to make a final decision for the Department.

Please also take notice that every effort will be made to insure an expeditious consideration and ruling in this matter.

/s/ William E. O'Brien

Exhibit 4 Annexed to Amended Complaint

277 (Filed January 18, 1955)

January 6, 1954.

Mailability of January-February, 1955 issue of Solaire Universelle Nudisme Magazine under 18 U. S. Code 1461

Assistant Solicitor, ECO'B:omd
Mailability Division.

H.E. Doc. 3/105

Solaire Universelle Nudisme Magazine,
Box 1000, Mays Landing, New Jersey,
Box 142 Oakland, New Jersey.

Please take notice that a hearing will be held at 2 o'clock p.m. on January 11, 1955, in the Post Office Department, Washington, D. C., Hearing Room 3237 before Mr. James C. Haynes, Jr., Chief Hearing Examiner, to determine the mailability of the January-February, 1955, issue of the publication entitled Solaire Universelle Nudisme Magazine, under the provisions of Title 18 United States Code, Section 1461.

Please also be advised that the undersigned will request a ruling by the Postmaster General or by the Solicitor pursuant to his duly delegated authority, declaring the aforesaid magazine to be obscene, lewd, lascivious and indecent and, therefore, nonmailable matter, which shall not be conveyed in the mails or delivered from any post office nor by any letter carrier under the provisions of said Title 18 United States Code, Section 1461.

The initial decision of the Hearing Examiner will be subject to appeal to the Solicitor.

/s/ William C. O'Brien

Order Denying Motion for Preliminary Injunction

278 (Filed January 21, 1955)

This cause having come on to be heard upon plaintiffs' motion for a temporary injunction on the 18th day of January, 1955, it is by the Court this 21st day of January, 1955,

ORDERED, That the motion for preliminary injunction is denied, and it is

FURTHER ORDERED, That the *status quo* is to be maintained until administrative proceedings before the Post Office Department commenced by hearings held on the 17th day of January, 1955 are completed,

BOTH PLAINTIFFS AND DEFENDANT waive pre-trial in this cause, and it is

FURTHER ORDERED, That the cause be and is hereby advanced for trial to be heard on the 31st day of January, 1955.

JAMES R. KIRKLAND
Judge

Certificate of Service

I hereby certify this 19th day of January, 1955, that I have sent by official United States mail a copy of the foregoing Order to Josiah Lyman, 501—13th St., N.W., Washington, D. C., and O. John Rogge, c/o Rogge, Fabricant & Gordon, 401 Broadway, New York 13, New York, attorneys for plaintiffs.

DONALD B. MAC GUINEAS
Attorney, Department of Justice

Defendant's Exhibit 1

Solicitor's Certificate

279 POST OFFICE DEPARTMENT
WASHINGTON

C. A. 74—55

January 28, 1955

I certify that the annexed papers are true copies of the original documents on file in this department.

In testimony whereof I have hereto set my hand and caused the seal of the Post Office Department to be affixed at the City of Washington, the day and year above written.

[SEAL]

ABE MCGREGOR GOFF
The Solicitor

Decision of the Solicitor for the Post Office Department on Appeal

280 POST OFFICE DEPARTMENT
WASHINGTON

January 28, 1955

H. E. Docket Nos. 3/103 and 3/105

In the Matter of the Mailability of
FEBRUARY, 1955 ISSUE OF "SUNSHINE & HEALTH MAGAZINE",
and
JANUARY-FEBRUARY, 1955 ISSUE OF "SOLAIRE UNIVERSELLE NUDISME MAGAZINE" as affected by
Title 18 U. S. Code, Section 1461.

This case has come to me for review on appeal from the initial decision of the hearing examiner. Review of the

entire official record and of the initial decision disclosed no erroneous findings of fact or conclusions of law. The initial decision is founded upon substantial evidence and contains correct rulings, findings of fact and conclusions of law upon all material issues. These magazines contain photographs of naked men, women and children, principally women, clearly revealing genitals, breasts and other portions of the body normally covered in public. It is apparent from advertisements therein contained that they are offered freely for sale to the general public who are not members of the nudist organization. The photographs appear to me obscene and indecent when judged by the ordinary community standards of the vast majority of citizens of this country.

281 The postmaster at Mays Landing, New Jersey, will accordingly be instructed to treat the February 1955 issue of Sunshine and Health and the January-February issue of Sun (Solaire Universelle Nudisme) as nonmailable.

(Signed) ABE MCGREGOR GOFF
The Solicitor

Defendant's Exhibit 1

Reply to Respondents' Notice of Appeal and to Exceptions to Initial Decision and Recommendations of Hearing Examiner

282 POST OFFICE DEPARTMENT
OFFICE OF THE SOLICITOR
Washington 25, D. C.

H. E. Docket Nos. 3/103 and 3/105

* * * * *

The Complainant herein respectfully submits the following reply to the Respondents' appeal and their exceptions to the initial decision and recommendation of Hearing Examiner.

I

Respondents exception No. 1 contends that the publications here involved are not obscene. These publications contain numerous pictures of men, women and children, both singly and associated, depicting such persons completely naked and exhibiting their genital regions to the readers of the magazines which have a general circulation which is not restricted to any particular groups, scientific or otherwise. Subscriptions are solicited from all and sundry and, therefore, they are presented as reading matter to be transmitted through the mails to all persons ordering same.

The appearance in public naked by the persons pictured in the magazines would unquestionably be considered indecent and such naked display of their bodies
283 would certainly result either in punishment or confinement to mental institutions. How then can the general distribution of their photographs so realistically displaying what is generally considered indecent to display in public acquire a different character so as not to be indecent. Obscenity has been judicially defined to mean that which is "offensive to modesty or decency * * * impure, indecent, lewd". *United States* v. *One Obscene Book*

entitled "Married Love", 48 F. 2d 821, 823 (S. D. N. Y. 1931). It has also been defined as that "which has the meaning of that which is offensive to chastity or morality," *United States* v. *Kennerly*, 209 F. 119, 121 (S. D. N. Y. 1913). A recent decision, *United States* v. *Two Obscene Books*, 99 F. Supp. 760 N. D. Cal. 1951) describes obscenity as a "form of indecency which is calculated to promote the general corruption of morals". Certainly the general practice of nudism would tend to corrupt public morals. It would break down the barriers between the sexes which, despite all claims to the contrary which may be made by Respondents or anyone espousing their cause, is the bulwark of general decency. Nudists well know that this is true and the restrictions which they are obligated to impose upon the visits of outsiders to their nudist camps (walled and enclosed for privacy) is quite indicative of their real belief with respect to the effects of nudity. As the Court said in the case of *United States* v. *Harmon*, 45 F. 414 (Kan. 1891) at page 417:

> "Laws of this character are made for society in the aggregate, and not in particular. So, while there may be individuals and societies of men and women of peculiar notions or idiosyncrasies, whose moral sense would neither be depraved nor offended by the publication now under consideration, yet the exceptional sensibility, or want of sensibility, of such cannot be allowed as a standard by which its obscenity or indecency is to be tested. Rather in the test, what is the judgment of the aggregate sense of the community reached by it. What is its probable, reasonable effect on the sense of decency, purity and chastity of society, extending to the family, made up of men and women, young boys and girls. * * * "

Defendant's Exhibit 1

As the Ninth Circuit Court of Appeals said in
284 *Besig* v. *United States*, 208 F. 2d 142, U. S. C. A. 9, October 23, 1953; "Indecency is easily recognizable"; "The statute forbidding the importation (here the mailing) of obscene books is designed to fit the • • • normal American concept in the age in which we live." The Ninth Circuit in the same case also expressed the thought that " • • • there is an underlying, perhaps universal, accord that there is a phase of respectable delicacy related to sex, and that those compositions which purposefully flaunt such delicacy in language generally regarded as indecent come under the ban of the statute." Here the pictures "purposefully flaunt" the delicacy with regard to sex which by universal accord results in covering the body to such an extent as not to offend the public morals and the community standards of decency.

The question of obscenity of Respondents' magazines was the subject of a decision by the New York Supreme Court in 1952. In that case the appellees here sought, as plaintiffs in the New York Supreme Court, a declaratory judgment and injunction against New York City Commissioners of Police and Licenses to prevent arrest or suspension of licenses of newsstand operators who were selling the same publications as are involved here. The Court, in refusing to enjoin the actions of defendants based on a penal statute prohibiting sale or distribution of obscene, indecent or disgusting books, said at page 483:

> "Where the dominant purpose of nudity is to promote lust, it is obscene and indecent. The distribution and sale of the magazines in this case is a most objectionable example. The dominant purpose of the photographs in these magazines is to attract the attention of the public by an appeal to their sexual impulses. The sale of these magazines is not limited to any mailing list of members or sub-

scribers. They are sold and distributed indiscriminately to all who wish to purchase the same. Men, women, youths of both sexes, and even children, can purchase these magazines. They will have a libidinous effect upon most ordinary, normal, healthful individuals. Their effect upon the abnormal individual may be more disastrous. Their sale and distribution is bound to add to the already burdensome problem of juvenile delinquency and sex crimes, and the Commisisoner of Police properly arrested those who participated in this violation of our Penal Law."

These publications were submitted to an advisory jury of twelve men for a determination on the question of obscenity. It is interesting to note that on December 8, 1953 that jury voted 10-2 that they are obscene.

II

Respondents second exception is to the examiner's conclusion of law that the administrative proceeding is not barred by reason of the doctrine of res judicata or stare decisis. This contention appears to have been already disposed of by the United States District Court for the District of Columbia in the hearing on January 18, 1955 before the Honorable James R. Kirkland in *Sunshine Book Company et al. v. Summerfield*, Civil Action No. 74-55.

Respondent relies upon Judge Schweinhaut's statement that certain earlier copies of these magazines are not obscene etc. in his opinion. The United States Court of Appeals did not affirm the District Court on this point and in fact, without so saying, indicates that the question is still open, that is not judicially determined in this Circuit. Judge Danaher said the magazines are obscene. The question is still open as to the obscenity of these nudist pictures in the pending cases. Certainly no final adjudica-

tion has been made as to the older copies of "Sunshine & Health" and "Sun". The Court of Appeals' decision indicates disapproval of a departmental order affecting future issues. With this Respondents agree but wish to apply the principle in reverse to the question of mailability. There appears to be no basis for doing so.

286 III

The third exception of Respondents objects to the Hearing Examiner's recommendation that the magazines in question be declared nonmailable under 18 U. S. C. 1461, arguing that they are not obscene and therefore, under the First Amendment, are entitled to mailing privileges without administrative hearing to determine mailability.

The Supreme Court has decided that the Postmaster General (or his duly authorized delegate) may exclude obscene matter from the mails under 18 U. S. C. 1461 (Act of March 3, 1873, as amended); *Ex Parte Jackson;* 96 U. S. 727, saying "we have no doubt" as "to the constitutionality of the Act." The Court's decision states that:

> "The power possessed by Congress embraces the regulation of the entire postal system of the country. The right to designate what shall be carried necessarily involves the right to determine what shall be excluded".

With respect to the exclusion of obscene publications from the mails the Court said that the postal officials

> " • • • can act upon their own inspection, and from the nature of the case must act without other proof; as where • • • the object is exposed (unsealed) and shows unmistakably that it is prohibited, as in the case of an obscene picture or print. In such cases,

no difficulty arises, and no principle is violated, in excluding the prohibited articles or refusing to forward them. The evidence respecting them is seen by every one, and is in its nature conclusive.

In excluding various articles from the mails the object of Congress has not been to interfere with the freedom of the press, or with other rights of the people; but to refuse its facilities for the distribution of matter deemed injurious to the public morals."

The Supreme Court's decision in *Ex Parte Jackson* was unanimous, and has not been reversed or modified by the Court.

As to administrative hearings, the right thereto is sustained by the United States Court of Appeals, Dis-
287 trict of Columbia in *Walker* v. *Popenoe* (1945), 149 F. 2d 511. The Court, through Associate Justice Arnold refers to dissent of Justice Brandeis in which he said that the Postmaster General in holding hearing must comply with the requirements of due process. The hearing, therefore, was a proper procedure in this case, and does not interfere with freedom of the press. In fact, the hearing could have been held much sooner and the decision expedited if Respondents had not caused delays—and they are seeking further delay to bolster their claims of injury through delay. Of course delay of a few days will not injure Respondents who have already received the price of the publications now being withheld from dispatch.

IV

Respondents' exception 4 has heretofore been considered in part on the question of obscenity. But it may be added that neither anthropologists, psychologists nor sociologists, if any there be approving nudism, have changed the

community standards of the United States of America so as to warrant a ruling that what they personally approve must be accepted by the rest of the nation.

Nor does the argument of Boone that nude photographs sold promiscously and repeatedly "eliminate neurotic curiosity of adults about the human body" appear to be reasonable. How many naked human bodies do the adults have to see in order to eliminate their "neurotic curiosity"? And if he is pandering to "the neurotic curiosity of adults" by selling them pictures of naked men and women, is not he admitting that the pictures are pornographic in character and effect. How many naked women must a man look at to get the full treatment? An endless number, no doubt, every one different and many of them pictured in the magazines, specially posed models, to give him visual gratification for his money and carnal gratification
288 or stimulation. Do women readers have to examine pictures of naked male genitals to cure their "neurotic curiosity". And, of course, every issue is different in the sense that photographs of new different naked people are presented to the curious eyes of the buyers. This practice is certainly not necessary to the teaching of anatomy or acquainting either adults or children with the character of the genitals.

V and VI

Respondents' exception V and VI object to the Hearing Examiner's exclusion of the "testimony" of certain named persons. Some of these people gave affidavits in support of an application to the United States District Court for an injunction in Civil Action No. 3007-53, *Sunshine Book Co. et al.* v. *Summerfield.* One of the affiants (Boone) was present at the hearing but did not offer to testify. None of the affiants had been subjected to cross examination and they did not appear in person and their statements

were about other publications. This is not "testimony" and was properly excluded. The same issue was raised about excluding testimony in the case involving charges against Sunshine Book Co. (Civil Action No. 3007-53) but the Court made no comment on the point.

As shown above, there is no expert on obscenity. The criterion to be applied is the common decency and community standards, which, of course, the whole community must recognize or else they could not be so called. And they are well known to an administrative official. If the subject were one involving obscure technical questions of science, expert testimony might be necessary and admissible. In the field of moral conduct every sane person is charged with knowledge of the community standards of morals.

289 The question of the relevancy of expert testimony on obscenity was considered in *United States* v. *Two Obscene Books*, 99 F. Supp. 760, wherein claimant introduced book reviews and affidavits of critics at the trial. The Court held that inasmuch as obscenity is a question of fact, the "opinions of so-called experts or critics are immaterial".

Respondents' exceptions 1 to 6 inclusive are without foundation in law or fact and should not be granted.

VII

Respondents' motion for leave to submit evidence on community standards should be denied, as should also their request for leave to show "evidence of accepted practices with reference to nudism in various fields of endeavor and in various areas of American life."

The circulation of these nudist magazines is not restricted to any particular "field of endeavor" or to particular "areas of American life". These magazines are sold to and mailed to all and sundry and the standards of the

community as a whole, which is the United States, are controlling. In the supporting memorandum, it is claimed that certain postal employees in 1951 agreed to admit in any future record testimony given by some of Respondents' witnesses in 1948. No such agreement was made although counsel in letter expressed a "wish" therefor. In any event such opinions as were expressed in 1948 may well have been changed in 1955 and inasmuch as they related to other older and different issues of nudist publications would be of no value or validity with respect to those here under consideration which the witness never saw. They should also be available for cross-examination concerning opinions on the current issues if their testimony were competent, relevant and admissible. Moreover, the Ninth Circuit Court of Appeals in *Besig* v. *United States*, 208 F. 2d 142, above cited held that "Indecency is easily
290 recognizable", and the indecency in Respondents' magazine constitutes no exception.

Furthermore, the credibility of such witnesses also would be in issue and unless the same hearing officer heard their original testimony, he could form no opinion thereon, nor make any finding or recommendation upon such a basis; *Gamble-Skogmo* v. *Federal Trade Commission*, 211 Fed. 2d 106. Therefore, there is no legal reason for reopening the mailability hearing record.

Wherefore, for the reasons above set forth Respondents' exceptions should be overruled and its request for further hearing denied.

Respectfully submitted,

(Signed) William C. O'Brien

To The Solicitor for the
Post Office Department.

Dated: January 27, 1955.

Defendant's Exhibit 1

Notice of Appeal

291 POST OFFICE DEPARTMENT
Office of the Solicitor
Washington 25, D. C.

H. E. Docket Nos. 3/103 and 3/105

• • • • •

Notice is hereby given of an appeal to the Solicitor of the Post Office Department from the initial decision and recommendation of Chief Hearing Examiner James C. Haynes under date of January 20, 1955.

Dated: New York, New York
January 24, 1955

O. JOHN ROGGE
Attorney for Sunshine & Health and Sun Magazine

Exceptions to Initial Decision and Recommendations of Hearing Examiner

292 POST OFFICE DEPARTMENT
Office of the Solicitor
Washington, D. C.

H. E. Docket Nos. 3/103 and 3/105

• • • • •

The respondents except to the findings of fact, conclusions of law, and recommendation of the Hearing Examiner as follows:

1. We except to the finding that the February 1955 issue of Sunshine & Health and the January-February 1955 issue of Sun Magazine are obscene. We contend that neither of these publications are obscene.

2. We except to his conclusion of law that this proceeding is not barred by reason of the doctrine of res judicata or stare decisis. We contend that the principles of res judicata, of estoppel by judgment and the doctrine of stare decisis are all applicable.

3. We except to the recommendation of the Hearing Examiner that the February 1955 issue of Sunshine & Health and the January-February 1955 issue of Sun Magazine be declared non-mailable. It is the position of the Publishers that their publications not being obscene
293 are entitled under the First Amendment right of freedom of the press to be freely disseminated and to that end to be dispatched promptly through the United States mails and without the interposition of any administrative hearings.

4. We except to the findings of the Chief Hearing Examiner at page 6 to the effect that these publications would stir the sex impulses of and constitute sexual provocation to the average male person viewing them. As we have shown in our brief whether one is sexually aroused depends upon the kind of a person one is and not on the publication one reads or the pictures one sees. As we have further shown in our brief the various anthropologists, psychologists, and sociologists who have dealt with the problem support Reverend Boone's thesis that the practice of nudism satisfies the healthy curiosity of children and eliminates the neurotic curiosity of adults about the human body.

5. We except to the Chief Trial Examiner's exclusion of the testimony of Dr. J. G. N. Cushing, Dr. Ralph Banay and Dr. Frederic Wertham.

6. We except to the trial examiner's exclusion of the affidavits of Dr. Albert Ellis, the Reverend Ilsley Boone, Dr. Charles Francis Potter, Eugene Thau and Margaret

Defendant's Exhibit 1

A. B. Pulis attached to the complaint in *Sunshine Book Company* v. *Summerfield*, C. A. 3007—52 and part of the joint-appendix filed by the Government in
294 *Summerfield* v. *Sunshine Book Company, et al.* (C. A. D. C. No. 12036).

O. JOHN ROGGE
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Washington, D. C.

Motion for Leave to Submit Evidence on Community Standards

295 POST OFFICE DEPARTMENT
Office of the Solicitor
Washington, D. C.

H. E. Docket Nos. 3/103 and 3/105

* * * * *

Now come the respondents and respectfully ask leave to submit evidence to show that their publications both in illustration as well as in text do not violate community standards. The publishers of the publications involved in this proceeding, Sunshine & Health and Sun Magazine, also respectfully request leave to show evidence of accepted practices with reference to nudism in various fields of endeavor and in various areas of American life.

O. JOHN ROGGE
Attorney for Sunshine & Health and Sun Magazine

Defendant's Exhibit 1

Statement in Support of Motion

296 There have been several prior proceedings in the Post Office Department involving the publication Sunshine & Health and at least one prior proceeding involving Sun Magazine. One of the proceedings involving Sunshine & Health began in April, 1948 and ended on motion of the Associate Solicitor on May 10, 1951. In that proceeding and in connection therewith there was offered and received the testimony of Dr. J. G. N. Cushing, and Dr. Ralph Banay. In yet another proceeding involving the publisher of Sunshine & Health there was offered and received the testimony of Dr. Frederic Wertham. In the discussions which led to the dismissal on May 10, 1951 there was an understanding between counsel for the publisher of Sunshine & Health and the then Solicitor of the Post Office Department that should there be any future proceedings in the Post Office Department involving issues of Sunshine & Health or similar publications that then either of the parties could use the testimony of the psychiatrist and other professional men in the previous proceedings. Pursuant to this understanding and also on the grounds of res judicata, estoppel by judgment, and stare decisis we offered from the previous proceeding the testimony of Dr. Cushing, Dr. Banay and Dr. Wertham, as aforesaid. However, the Chief Hearing Examiner refused to accept any of the offered testimony.

On the grounds of res judicata, estoppel by judgment and stare decisis we also offered the joint-appendix filed by the Government in the appeal of Postmaster General from Judge Schweinhaut's decision of July 13, 1953 in *Sunshine Book Company et al.* v *Summerfield*, C. A. 3007-52 to the Court of Appeals in a case there entitled *Summerfield* v. *Sunshine Book Company et al.*, No. 12036. This

Defendant's Exhibit 1

joint-appendix contained the affidavits of Dr. Albert
297 Ellis, the Reverend Ilsley Boone, Dr. Charles Francis Potter, Eugene Thau and Margaret A. B. Pulis attached to the plaintiff's complaint in that cause. These affidavits were not challenged in that proceeding and therefore have become binding on the Postmaster General. The Hearing Examiner although receiving the joint-appendix nevertheless excluded the affidavits of the five persons just mentioned.

The Post Office Department itself at the hearing offered no evidence other than to hand to the Chief Hearing Examiner the February 1955 issue of Sunshine & Health and the January-February 1955 issue of Sun Magazine. The Chief Hearing Examiner thus ended up with no evidence whatsoever except the publications themselves. We submit therefor that there should be in this record testimony as to community standards as applied to the publications involved in this proceeding and also evidence of the growing practice of nudism in various fields of endeavor and in various areas of American life. We accordingly submit that the Solicitor General should grant the motion of the publishers and rule that the offered testimony is to be received.

Dated: New York, New York
January 24, 1955

Yours, etc.,

ROGGE, FABRICANT & GORDON
Attorneys for Sunshine & Health and Sun Magazine
Office & P. O. Address
401 Broadway
New York, New York

Defendant's Exhibit 1

Notice of Right to Appeal

298 OFFICE OF THE DEPUTY POSTMASTER GENERAL
DIVISION OF HEARING EXAMINERS
POST OFFICE DEPARTMENT
WASHINGTON 25, D. C.

January 20, 1955.

H. E. Docket Nos. 3 103 and 3 105

* * * * *

Please take notice that an appeal to the Solicitor for the Post Office Department from the Initial Decision and Recommendation of the Hearing Examiner must be filed with the Docket Clerk, Office of the Chief Hearing Examiner not later than January 25, 1955, in order that the Department may comply with the ruling of Honorable James R. Kirkland, January 18, 1955, in the case of *Sunshine Book Company, et al.* v. *Arthur E. Summerfield, Postmaster-General*, U. S. District Court, District of Columbia, C. A. No. 74-55, that a final ruling must be made by the Post Office Department prior to January 31, 1955.

(Signed) JAMES C. HAYNES
Chief Hearing Examiner.

Defendant's Exhibit 1

Initial Decision and Recommendations of Hearing Examiner

299 OFFICE OF THE DEPUTY POSTMASTER GENERAL
DIVISION OF HEARING EXAMINERS
POST OFFICE DEPARTMENT
WASHINGTON 25, D. C.

January 20, 1955.

H. E. Docket Nos. 3 103 and 3 105

• • • • •

By orders dated January 14, 1955, the Deputy Postmaster General designated the undersigned Examiner to conduct a hearing, on notice to the publisher or his representative, and at a time and place to be fixed by the Assistant Solicitor, Fraud and Mailability Division, to determine the mailability under Title 18 U. S. Code, Section 1461, of the respective issues of the publications named in the caption hereof, and after such hearing, to make his initial decision and recommendation on the said question, with the provision that such decision and recommendation would be subject to appeal to the Solicitor for the Post Office Department. Notice of hearing fixing 10:00 a.m., January 10, 1955, for the hearing in the Sunshine & Health matter was issued by the Assistant Solicitor on January 6, 1955, and duly served on Mr. Ilsley Boone, publisher of both magazines, and his counsel by the Associate Solicitor on the afternoon of January 6, 1955. A further notice of hearing fixing 2:00 p.m., January 11, 1955, for the hearing in the "Solaire Universelle Nudisme Magazine,"
300 hereinafter referred to as "Sun Magazine" was delivered to the publisher by registered mail on January 11, 1955. Thereafter, pursuant to agreement between the Solicitor and the publisher, the date for the

hearings in both matters was continued to January 17, 1955.

On the last mentioned date the hearing was convened before me at 10:00 a.m., Room 3237, New Post Office Department Building, Washington, D. C., at which time the publisher was present and represented by counsel. By agreement between the Assistant Solicitor and publisher's counsel at that time, the hearings relative to the questioned issues of these magazines were consolidated (Tr. 4, 5).

Pending decision as to mailability of these magazines the postmaster at Mays Landing, New Jersey, the place of publication, was instructed by the Solicitor to withhold the magazines from dispatch in the mails (Tr. 5, 6).

The statute pursuant to which this proceeding was instituted declares in pertinent part "every obscene, lewd, lascivious, or filthy book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character, * * * to be nonmailable matter," and provides that such matter "shall not be conveyed in the mails or delivered from any post office or by any letter carrier." It is the contention of the Assistant Solicitor that the specified issues of these two magazines are obscene, lewd, lascivious and indecent, and therefore within the prohibition of the statute.

Both in argument at the hearing, and in a 60-page printed brief filed thereat by the publisher, the action of the Postmaster General and or his designated representative, the Solicitor, in ordering the postmaster at Mays Landing, New Jersey, to withhold from mailing the questioned

301 issues pending the outcome of a mailability hearing is vigorously challenged as wholly devoid of statutory authority. The publisher contends that no such authority is to be found either within the provisions of the statute invoked, or any other. He further contends that if Title 18, U. S. Code, Section 1461 be so construed as

to invest the Postmaster General or his legal representative with any such authority, said Section 1461 becomes unconstitutional as amounting to a prior restraint on publication (Tr. 7 et seq.; publisher's brief pp. 16 through 25, et seq.).

These issues, the resolving of which necessarily involves the decision of constitutional and jurisdictional questions of serious import, are not regarded as being within the authority of this Examiner to consider administratively, and sitting solely, by the terms of the Deputy Postmaster General's order of January 14, 1955, to render an initial decision and recommendation with regard to "mailability." It is this Examiner's opinion that such issues are more properly for adjudication by the courts, and this position was stated in the record (e.g. Tr. 94-96).

The February, 1955 issue of "Sunshine & Health" and the January-February, 1955 issue of "Sun Magazine" were received at the hearing (Tr. 7). Upon the basis of the evidence, and upon careful consideration of the argument and contentions of counsel for and against mailability, the following facts are found and recommendations made.

The February, 1955 issue of "Sunshine & Health" contains 32 pages, exclusive of the cover and backing. The front cover refers to it as the "Official Journal of the National Nudist Council, Inc., An Educational, Cultural, and Scientific Publication." The front cover displays a full-page photograph in color of an entirely nude,
302 young, attractive and shapely woman. On the inside of the front cover is another large photograph of a woman whose upper body and breasts are nude. On the rear cover there appears a large photograph of naked women and a naked man. The inside pages of the magazine contain some 15 photographs of naked men, women and children, singly and in groups. Details of naked buttocks, female breasts and pubic areas, and male genitalia

are clearly revealed in some of them. The printed text itself appears to be devoted largely to news of nudist clubs and nudist camps, articles and comments in praise and advocacy of nudism, directories of nudist clubs, and the like.

The January-February, 1955 issue of "Sun Magazine" is a 48-page publication exclusive of front and rear cover sheets. On the front cover it is described as "An International, Interracial Journal of Next Century Civilization." On the front cover and on the inside of the front cover are large photographs of two naked women, the former being in natural color. The rear cover displays a photograph of two naked women in a rubber raft floating on the water. Within the pages of the magazine are found some 25 or 26 photographs of naked men, women and children, shown singly and in groups. In some of these female breats and pubes and male genitalia are clearly revealed. Again, as is the case with "Sunshine & Health," the textual content of this magazine appears to be devoted primarily to comments and articles, espousing the cause of nudism and defending its tenets and *modus vivendi*. This issue also contains what is called "a survey" based on "Dr. Kinsey's 2nd Report." This "survey" concerns itself in some measure with discussing the delights of nudity "in the coitus of husband and wife" (pp. 17, 18). At the hearing the Assistant Solicitor stated that the discussion of sexual intercourse and of the Kinsey
303 Report "in a climate of this kind" "certainly tend to arouse lascivious ideas in the minds of those average normal people who may read it" (Tr. 31). With this possible exception, it evidently is conceded that the balance of the text in both magazines is unobjectionable.

The test evolved and commonly applied by the Courts in determining whether a publication is obscene, lewd, lascivious and indecent is whether the publication, taken as

a whole, would have a libidinous effect on the average person. In so determining, the publication must be considered as a whole, in its effect, not upon any particular class but upon all those whom it is likely to reach (*Parmelee* v. *U. S.*, 113 F. (2d) 729, U. S. C. A., D. C., dec. May 14, 1940). It is the "effect of a publication on the ordinary reader" that counts. The dominant effect of an entire publication determines its character and "obscene" indicates the present critical point in the compromise between candor and shame at whch the community may have arrived here and now (*Walker* v. *Popenoe*, 149 F. (2d) 511, U. S. C. A., D. C., dec. May 28, 1945; *Parmelee* v. *U. S., supra; U. S.* v. *Kennerly*, 209 F. 119).

It is a fact that by and large, Americans are a clothed people. Those who accept the exhibition of nudity and practice it themselves as adherents to the cult of nudism as yet constitute an exceedingly small minority of the population. It requires little more than common sense and the possession of knowledge gained from everyday experience to conclude that the display of the naked body, male and female, as permitted and encouraged by the nudists within the limited confines of their camps, is not acceptable to the aggregate community conscience and current-
304 ly prevailing standards of morality in this country. To most, such displays are immoral and indecent. It is not only predictable, but it is inevitable that displays of naked femininity such as are found in the publications here at issue will stir the sex impulses of and constitute sexual provocation to the average male person viewing them. Perhaps the individuals who will compose the "Next Century Civilization," as it is referred to in "Sun Magazine," may through some process of physiological and sociological evolution, come to be constituted differently. But considering average man, his natural inclinations and his reactions as they are known here and now, it is almost

axiomatic that naked female bodies, whether seen in the flesh or exhibited through the medium of photographs from real life, are a source of sexual stimulation to him. It may not be so in the case of the practicing nudist, but beyond any doubt the displays of nudity featured in these magazines are bound to sexually excite the ordinary, healthy male. This I consider to be their dominant effect on the ordinary person.

The right to practice nudism and to advocate its practices by any lawful means is not in issue here. But in the course of such advocacy the display of unadorned nakedness to the public generally is surely offensive to presently prevailing American standards of decency and modesty. The fact that the photographs in these magazines may illustrate nudist life and activities and are accompanied by relevant textual matter upon the subject does not in any way tend to lessen the erotic impact of the photographs themselves upon the mind of the ordinary person. For these reasons I regard the two issues of "Sunshine & Health" and "Sun Magazine" in evidence as obscene, lewd, lascivious and indecent (cf. *Sunshine Book Co.* 305 v. *McCaffrey*, 112 N. Y. S. (2d) 476, Supreme Court, Special Term, N. Y. County, Part III, dec. April 25, 1952).

Both in his brief and in argument at the hearing counsel for the publisher relies heavily upon *Parmelee* v. *U. S.*, *supra*, as authority compelling a favorable finding of non-obscenity. In that case a majority of the Court of Appeals for the District of Columbia, as against a strong dissenting opinion by Justice Vinson, held that a book on the subject of nudism, with pictures, was not obscene. It appears, however, that the *Parmelee* case can be distinguished from the situation here. On argument in that case it was conceded by the Government that the text of the books and most of the photographs were unobjectionable, within

the meaning of the statute there invoked. In one of the books, however, there appeared 3 or 4 uncolored, apparently unretouched photographs showing full front views of nude female figures and two photographs in which nude male and female figures appeared together. According to the statement in the majority opinion, these photographs were approximately 2¼ x 3¼ inches in size, and the human figures which appeared therein were approximately 1½ inches in height. The majority found that the presence of these few, small photographs did not furnish the dominant note of the publication.

In contrast, the issues of "Sunshine & Health" and of "Sun Magazine" herein evidence are given over largely to displays of nudity, which is so prominently and vividly presented as to be much more than merely incidental and subordinate to the printed text.

Counsel for the publisher also argues at length that the decision of the United States Circuit Court of Appeals for the District of Columbia, in the case of *Arthur E. Summerfield, Postmaster General* v. *Sunshine Book Company, et al.*, (No. 12026, dec. December 16, 1954) is
306 dispositive of this matter on the theory of *res judicata*. Specifically, the publisher points out that the question of the obscenity of some 25 issues of "Sunshine & Health" from March, 1951 through March, 1953, and seven issues of "Sun Magazine" from January-February, 1952 through March-April, 1953, was decided adversely to the Government by Judge Henry A. Schweinhaut in the Court below on July 13, 1953 (*Sunshine Book Company, et al.* v. *Summerfield*, C. A. 3007-53). The publisher further shows that Judge Schweinhaut's decision was affirmed on appeal in the case cited above. He argues that the two issues of the magazines here in evidence are substantially identical with those which Judge Schweinhaut determined were not obscene. From this, counsel argues that the present proceeding is *res judicata*.

This same contention was made in argument before Hon. James R. Kirkland, Judge in the United States District Court for the District of Columbia in a hearing on Tuesday, January 18, 1955, on this publisher's motion for preliminary and permanent injunction (*Sunshine Book Company, et al.* v. *Summerfield, Postmaster General*, C. A. No. 74-55). In considering this point and the applicability of the majority opinion, Judge Kirkland stated in part:

> "The Court, however, has pointed out certain language of the opinion which indicates that the majority of the Court was not making a decision on that [the obscenity] aspect of the case. It is noteworthy that the subject decision is accompanied by a strong dissenting opinion, and the dissenting Judge has no trouble in arriving at the opinion that these magazines under review in the prior case were obscene."

In argument at the administrative hearing, counsel for the publisher also contended that the doctrine of *stare decisis* should be held to be dispositive of the proceeding, if not *res judicata*. This argument was also made
307 by the publisher in the hearing on January 18, 1955, before Judge Kirkland. The Court ruled that that argument, as there made, is not controlling.

The most that can be said of the publisher's argument and citation of cases in the record showing that State and Federal Courts have held other publications, calendars and motion picture films containing nude pictures not to be obscene, is that they establish merely that the Courts have divided on the subject. It is, however, clear from a survey of the cases cited by both the Assistant Solicitor and the publisher that there exists no such weight of authority favoring the publisher in this proceeding as would warrant the application of the doctrine of *stare decisis*.

Defendant's Exhibit 1

FINDINGS OF FACT

1. That the February, 1955 issue of "Sunshine & Health Magazine" and the January-February, 1955 issue of "Sun Magazine" are obscene, lewd, lascivious and indecent.

CONCLUSIONS OF LAW

1. That this proceeding is not barred by reason of the doctrines of *res judicata* or *stare decisis*.

RECOMMENDATION

1. That the question of whether the Postmaster General or his legally authorized representative, has the statutory authority, direct or implied, to order the publications here in issue to be withheld from dispatch pending a hearing on their mailability, involving as it does constitu-
308 tional and jurisdictional issues of serious import, be not passed upon administratively but left to the decision of the Federal Courts.

2. That the February, 1955 issue of "Sunshine & Health Magazine" and January-February, 1955 issue of "Sun Magazine" be declared nonmailable.

(Signed) JAMES C. HAYNES
Chief Hearing Examiner

Defendant's Exhibit 1

Order Postponing Hearing

309 OFFICE OF THE DEPUTY POSTMASTER GENERAL
DIVISION OF HEARING EXAMINERS
POST OFFICE DEPARTMENT
WASHINGTON 25, D. C.

January 10, 1955

H. E. Docket Nos. 3/103 and 3/105

* * * * *

At the request of counsel for the publisher and with the agreement of the Solicitor, the hearing to determine the mailability of the February, 1955 issue of "Sunshine & Health Maga[redacted]" is hereby set to commence at 10:00 a. m., January 17, 1955, instead of January 10, 1955, as originally scheduled, to be followed on the same date by the hearing to determine the mailability of the January-February, 1955 issue of "Solaire Universelle Nudisme Magazine" instead of 2:00 p. m., January 11, 1955, as originally scheduled, said hearings to be held in the Post Office Department, Washington, D. C., Hearing Room 3237 before the undersigned Examiner.

(Signed) JAMES C. HAYNES
Chief Hearing Examiner

Defendant's Exhibit 1

Solicitor's Consent to Postponement of Hearing

310 January 10, 1955

Sunshine and Health, H. E. Docket 3/103 and
Sun, H. E. Docket 3/105.

Assistant Solicitor,
Mailability Division.

Chief Hearing Examiner.

Please be advised that the Solicitor has agreed to the request of Mr. O. John Rogge, counsel for the above named publications, that the Department postpone the hearing until 10 a. m. Monday, January 17, 1955. It is my understanding that the two cases presently on the calendar for that date will not be heard at that time.

Defendant's Exhibit 1

Letter dated January 6, 1955

311 WCO'B:omd
Sol. Doc. 2/369.

January 6, 1955.

Mr. O. John Rogge,
401 Broadway,
New York 13, New York.

Re: Mailability of February, 1955 issue of "Sunshine & Health Magazine" as affected by Title 18 U. S. Code, Section 1461.

Dear Mr. Rogge:

Transmitted herewith is a copy of a formal notice of hearing in the above entitled matter. The hearing is presently scheduled for 10 o'clock a.m. on next Monday, January 10, 1955 before the Chief Hearing Examiner for the Post Office Department.

Sincerely yours,

(Signed) WILLIAM C. O'BRIEN
Assistant Solicitor,
Mailability Division.

Enclosure.

Defendant's Exhibit 1

Notice of Hearing dated January 6, 1955

312 January 6, 1955.

Mailability of February, 1955 issue of "Sunshine & Health magazine" as affected by Title 18 U. S. Code, Section 1461.

Assistant Solicitor,
Mailability Division.

WCO'B:omd
H.E. Doc. 3/103

Sunshine and Health,
Sunshine Book Company;
Box 1000,
Mays Landing, New Jersey.

Please take notice that a hearing will be held at 10 o'clock a.m. on January 10, 1955, in the Post Office Department, Washington, D. C., Hearing Room 3237, before Mr. James C. Haynes, Jr., Chief Trial Examiner, to determine the mailability of the February, 1955 issue of Sunshine and Health magazine, copies whereof are now being withheld from dispatch by the Postmaster at Mays Landing, New Jersey, pursuant to instructions issued to him by the Solicitor for the Post Office Department, copy attached. The postmaster's letter to you dated December 31, 1954, copy also attached, advises you of the availability of a hearing but erroneously states that the Solicitor had already made a determination of nonmailability with respect to the magazine, no ruling or determination either of mailability or non-mailability having yet been made by the Solicitor or by any person authorized to do so by or in behalf of the Post Office Department. The Chief Hearing Examiner's initial decision and recommendation will be subject to appeal to the Solicitor for the Post Office Department to whom the Postmaster General has delegated the authority to make a final decision for the Department.

Defendant's Exhibit 1

Please also take notice that every effort will be made to insure an expeditious consideration and ruling in this matter.

(Signed) WILLIAM C. O'BRIEN

Letter dated December 30, 1954

313 December 30, 1954

Sunshine and Health Magazine
The Solicitor.

WCO'B:omd
Sol: Doc. 2/369.

Postmaster,
Mays Landing, New Jersey.

I have your letter of December 29, 1954 transmitting a copy of the February, 1955 issue of Sunshine and Health. It is noted that your letter does not state how many copies of the publication are being withheld from dispatch. However, you say you are holding several other copies to be handled as first class matter.

First class mail should not be withheld from dispatch. The copies of Sunshine and Health which are subject to inspection, namely the February, 1955 issue, should be withheld from dispatch and the senders should be notified by registered mail of this action. They should be informed that they may have an opportunity to show cause within fifteen days why the article should not be disposed of as matter nonmailable under the provisions of 39 CFR 36.2, by offering through appearance at this office in person or by attorney, or through submission of a statement in writing, whatever evidence or arguments they care to submit.

Defendant's Exhibit 1

They should also be informed that if additional time is required, application therefor should be made to this office.

Please furnish this office a copy of your letter of notice to the senders.

(Signed) ABE MCGREGOR GOFF

Letter dated December 31, 1954

314 Second

Mays Landing, N. J.
December 31st, 1954.

Sunshine and Health,
Box 1000,
Mays Landing, N. J.

Dear Sirs:

I have been requested by the Solicitor of the Post Office Department to inform you that the February, 1955 issue of "Sunshine and Health" is nonmailable and must be withheld from dispatch.

You may have an opportunity to show cause within fifteen days why the article should not be disposed of as matter nonmailable under the provisions of 39 CFR 36.2, by offering through appearance at the office of the Solicitor, Post Office Department, Washington, D. C. in person or by attorney, or through submission of a statment in writing, whatever evidence or arguments you care to submit. If additional time is required, application therefor should be made to the Solicitor.

Very truly yours,

E. J. Turpin,
Postmaster.
EJT/e

Defendant's Exhibit 2

Transcript of Proceedings Before Hearing Examiner

317 POST OFFICE DEPARTMENT

WASHINGTON, D. C.

H. E. Docket No. 3/103

In the Matter of:

SUNSHINE & HEALTH

H. E. Docket No. 3/105

SOLAIRE UNIVERSELLE

Hearing Room 3237,
Post Office Department Bldg.,
Washington, D. C.,
Monday, January 17, 1955.

Met, pursuant to notice, at 10:00 o'clock a.m.

Before:

JAMES C. HAYNES, Hearing Examiner.

Appearances:

O. JOHN ROGGE, 501—13th Street, N. W., Washington, D. C., appearing on behalf of Respondents.

WILLIAM C. O'BRIEN, Assistant Solicitor in Charge of Fraud and Mailability, Post Office Department, Washington, D. C.

. . . . .

Defendant's Exhibit 2

PROCEEDINGS

* * * * *

319 Exam. Haynes: This an administrative proceeding instituted by the Assistant Solicitor, Fraud and Mailability Division, of the Solicitor's Office, Post Office Department, to determine the mailability of certain issues of magazines entitled respectively, "Sunshine and Health Magazine." The issues there involved being the issue of February, 1955, and of another magazine, "Sun Magazine," the issue there involved being the January-February, 1955, issue.

The mailability question is brought up under the provisions of Title 18, U. S. Code, Section 1416. Without quoting the law verbatim, but for the purposes of identifi-
320 cation that the statute in effect declares to be nonmailable and forbids the conveyance in the mails and delivery from any post office or by any letter carrier of obscene, lewd, lascivious or filthy book, pamphlet, picture, paper, letter, writing, print or other publication of an indecent character.

Specifically, as I understand it, gentlemen, it is the contention of the Assistant Solicitor that the issues of these magazines I have named are non-mailable in that they are each obscene, lewd, lascivious and indecent, and as such are within the prohibition of the statute cited.

Two notices of hearing have been issued respectively and as I understand duly served upon the publishers or his counsel, which have specified today, January 17, 1955, as the date on which the hearings relative to these two magazines are to be determined, preliminarily, at least.

The first notice specified the hearing in the case of Sunshine and Health to go on at 10:00 a.m. this morning. The second notice set down the hearing in the second matter involving Sun Magazine to commence at 2:00 p.m. this afternoon. I might add that if we can conclude the

proceedings relative to the first magazine perhaps we can go ahead and get both proceedings concluded before lunch. It depends on the way the case goes.

Mr. Rogge: It is agreeable to do as the Hearing Examiner did in the prior case, to consolidate these two hearings.

Exam. Haynes: Do you concede that, Mr. O'Brien?

321 Mr. O'Brien: Yes.

Exam. Haynes: Then this hearing now in process may be considered as being upon the consolidated questions concerning both issues of the two magazines I have named in lieu of two separate hearings. The publisher of these magazines is duly represented here today by counsel.

By order of the Deputy Postmaster General, James C. Haynes, Hearing Examiner, has been designated to conduct this hearing and make an initial decision and recommendations. We all understand, gentlemen, that this is strictly a mailability proceeding as distinguished from a proceeding under Title 39, Section 259(a), or a proceeding under the postal fraud of the statutes, and as such is governed by no published rules of practice or procedure that I am aware of.

The burden of proof to establish non-mailability rests upon the complainant, that is, it is the Assistant Solicitor for the Fraud and Mailability Division.

I call your attention and note for the record that in the notice of hearing to the publishers the Examiner's initial decision or recommendations are made subject to appeal to the Solicitor of the Post Office Department to whom the Postmaster General has delegated the authority to make the final decision.

For the record, I further understand that the February, 1955, issue of Sunshine and Health, and the Janu-

322 ary-February 1955 issue of Sun Magazine are being withheld from dispatch through the mail at this

time by the Postmaster at the Office of Mailing pending a decision of mailability.

I will say that I intend to render my initial decision and make my recommendations as speedily as possible and have copies thereof served upon the parties with an order fixing a time within which the party adversely affected may note intention to appeal to the Solicitor unless the Solicitor himself desires to fix that time.

Following that, gentlemen, I assume it will be the Solicitor himself who will fix a date for the filing of appeal briefs and hearing argument, if that is desired by him.

You may proceed, Mr. O'Brien.

Mr. O'Brien: Mr. Examiner, I think you have had filed with you or with your Docket Clerk copies of the notice to Sunshine and Health dated January 6, and also a copy of the instructions of December 30 to the Postmaster at Mays Landing, and a copy of the letter of December 1 to Sunshine and Health and my letter to Mr. Rogge on January 6, transmititng the copy of the formal notice.

I don't believe that the record includes a copy of the Solicitor's letter of January 7, 1955, instructing him as to the treatment of the magazines we are—which are being withheld. I might say that this is occasioned by the reason of his writing to Inspector Sander of Philadelphia,
323 and saying there that he wanted to know if the magazines he was withholding should be sent to the dead letter office after ten days.

The Solicitor wrote and told him that there was no such thing. No ruling had been made and I want to put this in the record. I only have one copy.

Mr. Rogge: I have no objection to counsel introducing this.

Exam. Haynes: If it is agreeable, we will mark this Assistant Solicitor's Exhibit 1-A.

Defendant's Exhibit 2

(The document referred to was marked Assistant Solicitor's Exhibit No. 1-A for identification.)

Mr. O'Brien: Your file contains a copy of your order of January 10, setting the hearing date?

Exam. Haynes: Yes.

Mr. O'Brien: At this time I have to submit to the Hearing Examiner a copy of Sunshine and Health Magazine of February, 1955, and of Sun Magazine, January-February, 1955.

* * * * * *

339 Exam. Haynes: The question raised, the first question raised by the publisher, is a serious question in my opinion. I pointed out earlier that this proceeding is being conducted without the benefit of any published rules of practice or procedure and, therefore, nothing has been said with respect to the questions other than the question of mailability, which are properly within the scope of competency of an Examiner in this particular proceeding.

This is a very important question because I know, and both of you gentlemen know, that for a longer period of years the Postmaster General has, at least assumed, the authority of finding, as I gather, by implication and what has been regarded the intent of Congress in the passing of the statute of the character of 18 U. S. Code 1461, he has assumed for a long period of years in a case to instruct the postmasters and various offices to withhold various publications for mailing. Whether he acted erroneously in my judgment is not today settled in the books. If I here assume to pass judgment upon the propriety from a legal standpoint, from the Postmaster General, as he has performed it in the years past and with respect to the two publications up for today, I think I would be pos-

340 sibly assuming a test which, to say the least, would be an act of superarrogation. I don't think I have

the authority. The only place we are going to find and get a definite decision on the subject would be a court of law. If I thought I had the authority, I would make some ruling at this time. I don't think I have the authority. As a matter of fact, the question is so complicated I think probably an Examiner sitting here is probably a fact-finder rather than an arbiter of law as it exists today and should not undertake to interpret what you gentlemen pointed out to be conflicting dicta or statement on the subject of applicability of laws, which it affects either on the one hand authorization, or purportedly authorizing the Postmaster, to instruct the postmasters, to withhold a magazine for mailing or instruct a postmaster to impound mail addressed to a person charged with using the mails as a fraud or conducting a lottery or setting up obscenity.

The constitutionality under the First Amendment and the Second and Fifth Amendment may be the same, the deprivation of property and the question of prior restraint as an infringement upon the laws of freedom of the press. I am going to leave you just where this case begins. I am going to rule specifically so the question can be clearer before the court in its record as an Examiner assigned to find the facts with respect to these magazines and I don't regard myself as having the authority to rule upon
341 the propriety of the Postmaster General or the duly delegated representatives' action in instructing the postmaster in Mays Landing or elsewhere to withhold from dispatch these two issues here today. That is the only question before you.

Mr. Rogge: If the Examiner on a study of the law were to come to the conclusion that the Postmaster General was acting without authority, would it be beyond your province, as I understand it, to set up, from the Administrative Procedure Act, or would it be a superarrogation on your part to suggest to the Postmaster General that you had doubt

as to the power of proceeding in the way in which he is proceeding?

Exam. Haynes: I will say this in reply, this proceeding is not being conducted within the framework of APA. The only case on the subject which I found in some old files of mine held that a publisher in these mailability proceedings should be given a hearing if he requests one. Do you recall that case, Mr. O'Brien? That is the only one I know being at least specifically on that point.

Mr. O'Brien: I remember that, but I can't recall which case it was.

Exam. Haynes: District Court case in our own jurisdiction. I have assumed from the outset, Mr. Rogge, and I must continue to assume that this proceeding has not been instituted within the framework of the Administrative Procedure Act.

Mr. Rogge: I appreciate your statement to that
342 fact, and yet I wonder whether proceeding by analogy as we do so often in our law when we have no specific rule to guide us, whether as a mater of fact in conducting this proceeding you wouldn't do it as is done under the Administrative Procedure Act. However, this is a new proceeding.

Exam. Haynes: I would be willing if the courts hold that the Postmaster General has the authority to do what he has done in this case to recommend to the Solicitor that the rules of procedure be promulgated within the confines of the Administrative Procedure Act. There again you must hold unless the Assistant Solicitor has nothing else on the subject that as this proceeding is coming up before me today it is not being conducted nor is the—nor is it one of those cases in which our own rules of practice specifically brings it within the purvuew of an APA case wherein adjudication is required to be made upon the record after a hearing.

* * * * *

Defendant's Exhibit 2

Mr. Rogge: I wish to offer on behalf of the publishers a copy of the Joint Appendix prepared by the Government and filed by them with the Court of Appeals for the District of Columbia Circuit in Summerfield against Sunshine Book Company, et al., No. 12026.

That is the only copy I have left. I did feel, however, it was important for your purpose that you have before you here the record made in that case for several reasons, one, I am going to urge upon your Honor that what was decided there is res adjudicata here and I want to be heard on that.

In the second place, there were various affidavits put in by different people, a psychologist, a humanist, and an art expert, Reverend Boone, and his sister, which were not at all controverted by the Government.

You have the same issues between the parties. If you would not decide for me on the basis of res adjudicata, I am going to urge stare decisis.

It is for both of these reasons that I offer this document.

Mr. O'Brien: With these affidavits that you have incorporated in a transcript of the record, a joint appendix, which they admitted by the Hearing Examiner.

Mr. Rogge: They were not offered at the previous hearing.

What was offered at the previous hearing and I am about to offer that, was rejected.

These were filed in court and not contested by the Government.

Mr. O'Brien: Well, I contest them here. The practice which we follow here does not permit the filing of affidavits as evidence and therefore I think this document, regardless of what the statements may be in some other proceeding, should be not be admitted here. It is prejudicial and I have no opportunity to deal with these affiants.

Mr. Rogge: These were documents that were filed in our

suit for injunctive relief which were not denied by the Government, and indeed when the case came on for hearing Judge Schweinhaut asked the parties whether he could decide the case on the basis of the record before him, and the government said, Yes, even as I did.

351 They are documents attached to the pleadings and not denied in that case.

Mr. O'Brien: Well, I deny them now, sir.

Mr. Rogge: It is too late.

Mr. O'Brien: No, it is not. Not in this case it is not too late. I think this document should be rejected, Mr. Haynes.

Counsel is altogether too anxious to put in affidavits which are by persons who will not testify here and prejudice this record, and introduce matters which are not germane to the issues at this time.

Mr. Rogge: This is a document which the government itself filed in the Court of Appeals.

Mr. O'Brien: I would not agree to it.

Mr. Rogge: I can't help that. The Government and Mr. O'Brien are not the same.

Mr. O'Brien: That is right. I object to any matters under a different proceeding and under a different statute.

Mr. Rogge: There may be a few pencil marks on this which I ask the Examiner to ignore, but the printed part is just as the government filed it.

Exam. Haynes: Are you offering this in support of what point?

Mr. Rogge: Several points.

One, I say that the determination of the judge,

352 Judge Schweinhaut, that the 25 issues of Sunshine and Health from March 1951 through March 1953, and the seven issues of Sunshine Magazine from January-February, 1952, through March-April 1953, that that is determinative of this proceeding on the basis of res adjudicata.

Defendant's Exhibit 2

Judge Schweinhaut specifically ruled that these various issues involved there were not obscene and further on would compare the January-February 1955 issue of Sun Magazine with the ones that Judge Schweinhaut ruled were obscene you can see that we fall clearly within the corners of the decisions.

As a matter of fact, if what you judge obscenity by, and I think this is Mr. O'Brien's test, is the amount of nude figure that is shown you are going to find considerably less in the current issues than in the ones that Judge Schweinhaut ruled on.

Furthermore, it is not quite accurate to say that this was just a personal opinion. It was one of the issues specifically raised. It was passed on and the court of Appeals while not going into this at length did in sustaining the opinion refer with approval to the case of Parmelee against United States, 113 Federal 2nd, 792, a case involving a nudist publication of book with pictures of nudes in the book, and I am going to go into that decision later, and they held that they were not obscene on the basis of res adjudicata, I am offering that.

353 I am offering it also on the ground that this was part of the pleading record between the same parties, and I submit that even the issues were the same, namely, whether certain numbers of Sunshine and Health Magazine were obscene.

This is part of the pleading record which is binding on those parties and may be offered in subsequent litigation as conclusive on that issue of fact.

We have argued the question of res adjudicata at page 31 through 36 of the brief which I have submitted to your Honor.

We have in our law the finality of determinations of issues. If two people have litigated something or if a citizen has litigated something with his government and

there has been a decision that binds these parties I think that gives security to the individual and it also saves the time of the Court.

Now, when you have this in civil cases, it is known either as res adjudicata or estoppel.

By judgment and incidentally the last term of the Supreme Court in Partmar Corporation versus Paramount Pictures, 347 U. S. 39 and we quoted from the case on page 33 and 34, and they mention both branches.

They say, "We have often held that under the doctrine of res adjudicata a judgment entered in an action
354 conclusively settles that action as to all matters that were or might have been litigated or adjudged therein.

But a prior judgment between the parties has been held to operate as an estoppel in a suit on a cause of action different from that forming the basis for the original suit only as to those matters in issue or points controverted, upon the determination of this latter aspect of res adjudicata is the doctrine of collateral estoppel by judgment, established as a procedure for carrying out the public policy of avoiding repetition litigation."

We are on both cases here. I think the issues are the same. The causes of the action are the same and we are dealing in both of them here, are these publications obscene, or whatever that may be.

That is precisely the same issue in both cases.

You can take it on a lesser aspect. You can tell me that the cause of action is different and I tell you that you fall within the latter aspect, and I quote from the Supreme Court again, "This latter aspect of adjudication is the doctrine of collateral estoppel by judgment, established as a procedure for carrying out the public policy of avoiding rep[illegible]ion litigation."

We h[illegible] that in the crimnal laws too. It is known as

double jeopardy, and the courts have been liberal in the finality of proceeding.

355 They have rejected suggestions that it is a technical defense and double jeopardy has been applied not only to prosecution of the same offence but also to the prosecution for perjury concerning an issue that was involved in the main criminal trial.

We cite one case for instance where one was indicted for robbing a bank and acquitted and subsequently was indicted for perjury for swearing that he was not at the scene of the crime.

The court held that it could not be done. The doctrine of res adjudicata have been applied even though the parties are not the same.

If you have a case of estoppel that the city is supposed to maintain and it is not maintained and several different people have an accident there and one of them litigates it with the city and the city is held to be negligent that decision is held conclusive.

The courts have been liberal with the doctrine of res adjudicata, and either in a broad sense or narrow sense by estoppel.

Over in the Soviet Union they can always administratively re-open something. You could have handed the determination down that these were not obscene and the next Commisar can say they are and to open it up again.

That is not true with us, and it decided the case
356 before Judge Sweinhaut and it is now up on appeal that might end the matter.

I think it goes with being a free people and also it will save you time.

What constitutes an identity of issues? It has been held for instance where there was an action to cover on a first installment on an account of guaranty the result in that proceeding would be determinative in a subsequent suit for further installments.

The parties thought up the new ideas. The Court said, No, you will litigate that.

357 In Mason Lumber Company, 101 U. S. 638, the Supreme Court by way of dictum suggested the same approach in an income tax case involving different years and royalty agreement running for a period of years and years. The Supreme Court there said: "Of course, where a question of fact essential to the judgment is actually litigated and determined in the first tax proceeding, the parties are bound by that determination in a subsequent proceeding even though the cause of action is different."

I say then he is bound on estoppel by judgment because the factual issues are the same, namely with certain publications as the Post Office Department contends obscene.

I say to Your Honor that if you compare the current issue with the issues which were ruled not obscene, you can't help but come to the conclusion that there is less material in the current numbers. As a matter of fact, until this proceeding arose, and I see these from month to month, I thought that the Post Office in a sense really went on a tangent. My client feels that it is a matter of principle to show this human body as it is. But as I look through the current numbers it seems to me that even Mr. O'Brien couldn't feel that they were obscene because you will find fewer pictures of nudists in the current numbers than in the old ones.

That doesn't satisfy Mr. O'Brien. He is still going to keep on going. If we apply what I said is the wholesome doctrine either of res adjudicata or estoppel by judg-

358 ment in the determination in that case, then it should be applied here, that Your Honor should say that Hearing Examiners, and courts, and judges, if you please, have plenty of work to do without hashing and rehashing what has been gone into. This was gone into in a proceed-

ing which is now pending in the Court of Appeals. If the government wants to appeal that or go to the Supreme Court, that is up to it. For the time being I am bound by that either as res adjudicata or as estoppel by judgment, and the third ground, that the uncontroverted pleadings in that case between the same parties that are involved here are binding upon them, and since those pleadings were not controverted here I offer the exhibit for those three reasons.

Mr. O'Brien: Now, it should not be accepted in this record under any rule of law that I know of. Even if it was attached to some previous litigation not bearing upon this question of mailability under the U. S. Code. Again on this strong plea, for the application of res adjudicata, and I wonder if the principle applies, or would be held by counsel to apply, if this issue, this February issue of Sunshine and Health was declared non-mailable and held to be non-mailable by the District Court. Would that foreclose all the squeeze as to every future issue of Sunshine and Health which could have different pictures and different effects? That seems to be turning the coin over and looking at it from the other side.

I am sure this Department has had enough con-
359 tacts, and it is told that each issue or publication may stand on its own feet. Obviously if we declare the publication non-mailable because it contained advertisements of the Irish Sweepstakes, the mailability of it would be determined upon whether or not it continued to carry such advertisements or didn't.

I don't see any reason to consider a question of this kind under any different rule of law.

Mr. Rogge: If a court has ruled that this publication is not obscene, then another publication which is substantially similar, even though it is not, but even though it is a completely different publisher, I would say that on the basis of stare decisis and you are in the same position,

you are judging, then I would say to look at it from that position. When you look at those publications you can look at future issues. If, for instance, you had a publication that was held to be not obscene and further or future issues would show a couple in coitus on a prior issue, well, you might say that goes beyond. But as long as a future issue, and you have a favorable reference to it, and as long as publications are substantially of the same nature, then, Your Honor, even though there were different parties it would still, it seems to me, in the interest of justice apply the rule of stare decisis.

Exam. Haynes: On the exhibits you have offered, Mr. Rogge, and since you have raise that point of res adjudicata and stare decisis, I am going to receive this
360 joint appendix, but the question about these affidavits and their place in this case is still to my mind not altogether settled. I notice, by the way, from scanning the decision of Judge Schweinhaut, as reported in this joint appendix, he questioned whether he needed any affidavits. He said he couldn't decide the case on the basis of the magazines themselves and the briefs.

I don't know whether he considered the affidavits or not, but I do think whether or not they are covered, that since these affidavits as I read them are in the nature of certain expert testimony, and some of them are, and I may be wrong, but they actually should be more properly presented, through witnesses, so that cross examination may be had.

I am going to rule this way. I will receive the joint appendix for what is contained therein, but with the understanding that I will not give any weight to the affidavit, and I will decide the case on the exhibits and the arguments you gentlemen have made.

The report and Schweinhaut decision concludes with a conclusion of law, one, that the publications Sunshine and

Defendant's Exhibit 2

Health and Sun Magazine are not obscene and goes ahead to state that those issues do not fall within 39 U. S. Code, Section 259(a). As I recall the case in the Court of Appeals and I have heard what you had to say about that, the majority, and even though the Parmelee Case was cited, didn't touch the question of obscenity. The decision
361 in which they affirm the lower court was on the basis that it would intend to embrace future issues, the enforcement of the order in that case would have the effect of prohibiting the delivery of mail for the purpose of future issues, and that the Postmaster General could not foretell or prophesy whether those future issues would obtain to be obscene or not.

The majority opinion never did state definitely or undertake to state or pass upon the question of obscenity. The dissenting opinion was of Justice Danahar, who was at complete odds, and he went forth to express his contrary opinion to say that in his judgment at least those issues will obtain. I am not trying to make law out of a dissenting opinion. When you get down to your arguments of stare decisis and res adjudicata had the Court of Appeals affirmed on the ground of non-obscenity, you might have something else here, but I can't see where the majority opinion helps us in regard to the question of obscenity, whether the question related to those issues in the full report or in these particular ones here.

However, you argue that in your brief, I see.

Mr. Rogge: I make this observation: I think it is an understatement to say that the Court of Appeals didn't get to the question of observation at all because there wouldn't have been any point in citing favorably the Parmelee Case. In this last paragraph, although at the same time they say "in this view of cases, it does not become necessary to pass upon other questions
362 raised by the appellees as to the constitutionality of applicability of this statute, as to the propriety

of the Postmaster General's finding that the publications involved were obscene."

I think that it is fair to say that what the Court of Appeals is doing in affirming Judge Schweinhaut, and I don't think his opinion, decision, should be underestimated, that it was his considered opinion in affirming—the Court of Appeals said: "Well, we didn't get to a discussion of that question, but Parmelee is the way we are thinking about it."

Well, if that is the way they are thinking about it, they then agree with Judge Schweinhaut that that is the way they are seeing it. I don't think I can look at that case with approval or disapproval.

Mr. O'Brien: The Parmelee Case is no precedent for this magazine. The book contained a number of small pictures, insignificant in size, to a full-page illustration here. The character of the things represented were indistinct and hard to see. The text of the book comprised at least 99.9 per cent of its content. The pictures were insignificant in both size and number.

Here you have a magazine which has pictures of naked women and some of them posed as models, flaunting their nudity and sexuality to the purchaser. It is a different proposition, and no court could possibly have the
363 Parmelee decision applied here.

In fact, I read the Court of Appeals decision, and it says in effect, we don't think that Schweinhaut was right, and we think the Postmaster General can and should find some way to apply the postal obscenity statute to the problem.

It invites the Postmaster General to find some way to apply 259(a). In the last two pages it invites him to do that.

Mr. Rogge: Mr. Examiner, even if you had a paragraph in plain print, Mr. O'Brien and I wouldn't agree as to its

meaning. I read that case otherwise. Indeed, I think that for this great government of ours to proceed now issue by issue is really the kind of harassment that I think is unworthy of it.

If the government is out to destroy a publisher, ultimately it will. If you are going at this month by month and you are going to hold a publication up for a couple years, each issue, it is through. You may as well say that. The government will have the satisfaction of knowing that it has destroyed the publisher.

I want to make one further offer. I don't have it in the record in this case. It is on file with the Solicitor. That is the proceeding that began in April, 1948, and dismissed on the motion of Associate Solicitor May 10, 1951. It was this material that I offered in the previous proceeding and was rejected. At the time of the dismissal of the proceeding, dismissed on May 10, 1951, there was an understand-
364 ing between the Solicitor and counsel for Sunshine Book Company that in future proceedings, either side could refer to the testimony, and therefore before 1952, and I don't know how far back that goes, it was the practice apparently sometimes to take testimony. In the 1952 proceeding and since then testimony was not taken. If there had not been such an understanding these witnesses were subjected to examination and cross examination.

It is again between the same parties and I also think the issues are again the same because it involved that proceeding starting with the May, 1948, number and was enlarged to include also the June, July and August, September and October, 1948, issues.

I want to offer the testimony of Dr. Ralph Benay, which occurred at pages 416 to 526 of that proceeding. I would like to offer here also the testimony of Dr. Frederick Worthem, and I get my page numbers from secondary

sources, but I see Dr. Frederick Worthem is quoted. He was a witness subject to examination and cross examination.

I also wish to offer from that proceeding the testimony of Dr. J. G. Cushing, whose testimony is found at pages 719 to 842 of that prior record.

I would like to offer the testimony of those three doctors, the examination and cross examination in this proceeding.

Mr. O'Brien: I object to that offer, whether it be opinion or otherwise, and I suppose that is what it was, and
365 I object to that being entered into a record. Testimony should be with respect to the current problem and the current facts, that is, with respect to these publications which are here now for examination. I demand the right to cross examine anyone who has any opinion testimony with respect to these issues.

What he said in 1952 or whether he was adequately cross examined or wasn't, I don't know, but I do know that I have a right here which I insist upon, to be confronted with the witnesses who have testified and whose opinions are to be relied upon by the other side in this case.

I don't know of any reason why I should be deprived of that right.

Exam. Haynes: What about the thought here that testimony, both direct and cross examination, given by witnesses, whether expert or otherwise, in any prior case in which the present parties were present were admissible in evidence in any subsequent proceedings?

Mr. O'Brien: I don't think it would apply. We have definite issues, definite and different questions with respect to these issues, and contents of the publications are different. The pictures are similar, but the contents as a whole were different and what these men would say with respect to them remains entirely unknown.

Defendant's Exhibit 2

You are asked to take former testimony and apply the theory that whatever they approved then would be
366 approved here today. We are talking about fairness and I think the government is entitled to fairness.

Exam. Haynes: I was thinking about the applicability of the law. I gather from the position of the government and Assistant Solicitor these two issues here considered by him as being separate and independent and different from should be so considered by the Examiner and the Solicitor and Postmaster General independently of any past issue of the two magazines which have been heretofore considered, is that correct?

Mr. O'Brien: May I say that the opinion of those gentlemen two or four years ago may be entirely different today about the very same thing.

Exam. Haynes: I am going to sustain the objection, Mr. Rogge. If we are going to adjudicate what is here before us today as a new type procedure, I want to do it from a completely de novo or fresh start. I am inclined to agree that testimony in that case, four years ago, may be speculative. They may act differently. It may be that the real allegation of such obscenity was based upon nude pictures or pictures of mixed nudes, but there may be a qualitative question involved. I don't know how these pictures compare, whether more than the other or less. A psychiatrist or social worker, or sociologist could give definite testimony. I will not consider that testimony in the old Sunshine and Health case some four years ago.

Mr. O'Brien: This document which you have ad-
367 mitted for whatever it is worth, I suppose, in the Court of Appeals decision, that these affidavits, that they are copies of affidavits, and in this printed copy here are made by persons who were not subjected to any cross examination concerning the things they state herein.

Exam. Haynes: I am not receiving the affidavits, Mr.

O'Brien. Although they are physically part of the appendix they will not be considered by me. The rest of the opinions will be received in support of the contention that this is res adjudicata or stare decisis.

Mr. O'Brien: Mr. Rogge talked about harassment and repeated action. I say to you that as long as a person violates the law he may expect to encounter opposition from the government.

Mr. Rogge: I have nothing further to offer, Mr. Examiner, but I would now like to make an argument on law as to whether these issues are obscene, and I now come to my last ground, stare decisis. This is covered at pages 37 to the end of the brief, which I submitted to you, sir.

Exam. Haynes: Before we forget it on this joint appendix, I am going to mark, and the reporter will authenticate this, as being in evidence, with the exception of affidavits as publisher's Exhibit No. 1.

(The document above referred to was marked Publisher's Exhibit No. 1 for identification.)

* * * * *

Transcript of Proceedings on Motion for Permanent Injunction

1 IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

C. A. No. 74-55

SUNSHINE BOOK COMPANY,

Plaintiff,

v.

ARTHUR E. SUMMERFIELD Individually and as Postmaster-General of the United States,

Defendant.

Washington, D. C.
Monday, January 31, 1955.

The above-entitled case came on for hearing on motion for permanent injunction before the Hon. James R. Kirkland, Judge, at 10:00 o'clock a.m.

Appearances:

On behalf of the plaintiff
O. JOHN ROGGE, Esq.

On behalf of the defendant
DONALD B. MAC GUINEAS, Esq.
Department of Justice

2 PROCEEDINGS

* * * * *

Mr. Rogge: There are certain things I want in the record, but counsel is offering them.

Mr. Mac Guineas: At the outset, Your Honor, I should like to offer a certified copy of the papers and opinions which have been filed in the administrative proceeding before the Post Office Department.

Would it be well to mark that as defendant's exhibit so it gets into the record, Your Honor?

The Court: I should think so, so that it can be recorded and made a part of the record.

Is there any objection to this, Mr. Rogge?

Mr. Rogge: I also wish it to be in the record, Your Honor.

The Court: There being no objection, let it be received.

Mr. Mac Guineas: That will be Defendant's Exhibit 1.

As Defendant's Exhibit 2 I should like to offer a copy of the transcript of the administrative hearing in the Post Office Department.

Mr. Rogge: Again, no objection.

3 The Court: Let it be received.

* * * * *

Mr. Rogge: * * *

In the case of these publications 25 percent, in the case of Sunshine and Health, 30 percent, and in the case

4 of Sun Magazine went through the mails, and a substantially larger portion of return came from these mail subscriptions than from other sources. And this is one of the facts of today's life. It is attested to by the rules and regulations of the Post Office Department as to second and third class mail.

If the Postmaster-General, as to those publications, has the power that he claims under Section 1461, he has the matter of life and death of publications; he becomes a

censor of what Americans may read and may not read, and he does the very thing which flies in the face of our whole Anglo-American tradition of opposition to prior restraint.

It is why I want to urge that Section 1461, a penal statute, is something which was never intended for the use that the Postmaster-General now makes of it. It is a new assertion of power.

Now the four points that I want to make are these:

One, that there isn't any statutory provisions in Section 1461 or any other federal statutes which specifically gives the Postmaster-General the power that he claims in this case.

My second point is that if Section 1461 were construed to give him this power it would become unconstitutional as violating the First Amendment.

My third point is that the so-called hearing in this
5 case really isn't a hearing at all. What the Postmaster-General wants to do, he wants to take one of his hearing examiners and have him sit down with the publication and that is all he took in the prior proceeding, the record of which is before Your Honor and which is incorporated into the pleadings here by reference and C. A. No. 3007-53, which was affirmed on appeal in this recent decision, Summerfield against Sunshine Book Company, et al. They refused it there, too.

What happened in this case and the record that was introduced before Your Honor shows it, is that we were there before the hearing examiner and the Assistant Solicitor offered up the February issue of Sunshine and Health and the January-February issue of Sun Magazine and that was it.

Now, in order to save expense and also cost I think the law warranted it, the publications did offer some evidence. They offered the joint appendix which the Government

itself filed in the case that was affirmed on appeal in No. 12036 that had five affidavits attached to the complaint. They were not controverted in any way in that case.

I felt and still feel that on the basis of either res judicata or estoppel by judgment the Government is bound by those. I also offered the testimony of three witnesses in a prior proceeding to that; witnesses who had been subjected to cross-examination.

6 The hearing examiner, as Your Honor will see from the Defendant's Exhibit 1 of today, ruled adversely. We appeal to the Solicitor as their procedure provided in this case. It isn't under the Administrative Procedure Act.

This claim of power is so new that they haven't worked that out.

The hearing examiner also stated that it wasn't under the Administrative Procedure Act but whether it was or not we got the same kind of a so-called hearing.

Along with the notice of appeal I made a motion to the Solicitor that we be allowed in addition to present some live witnesses. The response to that was a ruling which I didn't get until 10 o'clock last night, but a ruling by the Solicitor sustaining the hearing examiner; and in doing so he refers to what he calls substantial evidence to support the hearing examiner's finding. That is a mockery, if Your Honor please. He says here:

> "Review of the entire official record and the initial decision disclosed no erroneous findings of fact or conclusions of law. The initial decision is founded upon substantial evidence."

That was a mockery. There wasn't any evidence. The only thing that the hearing examiner had, and this is the way the Postmaster-General wants to work it out, all that he had before him was the publications and he wants to

work it out so that he has the power to sit down and
7 determine for the American people what they may read and what they may not read.

And furthermore, if he has this power he can determine what publications the American people may see and what publications they may not see. Because if he wants to destroy a publication all he has to do is month after month get them out this kind of a notice and those publications are through. That is the very thing that the English and American people have always resisted. The resistance to prior restraint is the very thing that led to the First Amendment freedoms.

But the Postmaster-General now wants to work it out so that he really ends up having the kind of power that you associate with a cultural commissar in the East. They can determine what people may see and may not see. That is the power that the Postmaster-General wants.

My fourth and last point—

The Court: Would you state your third point again?

Mr. Rogge: That there was no hearing, if Your Honor please.

The Court: All right, I understand.

* * * * *

The Court: * * *

9 I am prepared to make some initial rulings because we have had a lot of law on the subject and get down to the merits of the case.

If you want I am perfectly willing to receive testimony provided it is on the issue.

Is there anything else you want to speak of by way of opening statement?

Mr. Rogge: I have covered it in an opening, if
10 Your Honor please.

The Court: All right, I understand you are contending first of all there is no statutory provision under

Title 18, Section 1461, that if such a title and section gives a power in the law the power is not constitutional, that there was no hearing had in the administrative process and that the publications involved in this particular case are not obscene.

Mr. Rogge: Those are my four main points, if Your Honor please.

Mr. Mac Guineas: Developed more at length in our trial brief, Your Honor, we view the case in this light:

As we see it there is no real dispute on the facts in the case; it turns on certain propositions of law. Apparently neither side at this trial proposes to offer any testimony.

In other words, the case is to be submitted on the administrative record made before the Post Office Department.

The Court: If either side desire, it being a hearing on the merits, I will receive testimony provided the hearing is germane and relevant.

Mr. Mac Guineas. We certainly don't desire.

Mr. Rogge: I haven't had a chance to reply to the Court's statement on that, but I shall wish to consider that with the Court.

* * * * * * *

15 The Court: I would gather from the Government's position the Government contends, first, that by failure of the plaintiff in this cause to introduce testimony or present other argument before the hearing examiner that he has waived the right to do such here. Then I gather from the main legal points it is contended, first, that the administrative hearing and procedure was contemplated under this particular Title 18, Section 1461; and that, second, the scope of the judicial review points out that there is to be both the aspect of the non-mailability and criminal penalties applying both to corporate and

human defendants; and that, third, the Court should refuse to accept any construction of that finding unless it is arbitrary and capricious.

Gentlemen, in order that we may be able to join issue on this, since certain matters have received very widespread attention over the years, this statute has been in existence approximately 75 years, the Court feels that it should make some preliminary decisions so that both sides will have the points preserved of record for any future proceedings.

16 First of all, with regard to Title 18, U. S. Code 1461, it is to be noted that at the very outset of the section itself the Congress set up five tests to determine what were non-mailable—namely, obscene, lewd, lascivious, filthy, or a publication of an indecent nature, and specifically declared it to be non-mailable matter and should not be conveyed in the mails or delivered from any post office or by any letter carrier.

The language is such and broad enough that this Court is going to rule as a matter of law that there is statutory provision, while in general terms, sufficient to clothe the Postmaster-General with the right to determine by the proper legal tests whether there is mailable matter or not. And though there are criminal penalties that does not vitiate the matter, the matter has been before the courts, notably in the case of Tyomies Publishing Company vs. United States from the Sixth Circuit, 211 Fed. 385, Ex parte Jackson, 96 U. S. 727, ex parte Rapier, 143 U. S., 110. Public Clearing House v. Coyne, 194 U. S. 497. Rebhuhn vs. Cayhill, Southern District, New York, 31 Fed. Sup. 47, and as the Court pointed out in the Tyomies case, supra, the statute is not in derogation of the constitutional rights of the defendant as publishers of a daily newspaper.

The constitutional guarantee of a free press cannot be made a shield from violation of criminal laws which are

not designed to restrict freedom of the press, but
17 to protect society clearly from acts clearly immoral or otherwise injurious to the people.

As was pointed out by Mr. Justice Murphy in Chaplinski vs. New Hampshire, 315 U. S. 568, Page 571:

> "There are certain well defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problem. These include the lewd and obscene, the profane, the libelous and the insulting, or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."

The Court is going to rule that there is power under Title 18, Section 1461 for the exercise of which the Postmaster is charged and that is well settled, and the Court will, of course, note the objection to that ruling on behalf of the plaintiff.

With regard to the hearing had, of course that lies within the scope set out by the Postmaster. It must be reasonable. It must be fair. It must accord with due process. There must be notice, opportunity to pre-
18 sent by counsel and the witnesses, and then the proceedings will depend upon what methods each side employs to present the facts.

With publications the situation is somewhat different because the greater part of the facts comes from the publication itself.

The Court is going to rule, however, on these opening

statements that whether the plaintiff produced little or no testimony is not controlling, whether he was present and made a legal argument or what form his answer actually took, that this particular Court at this hearing is not foreclosed by it.

As to there being no statutory provision, the Court has already ruled. As to its constitutionality, if there was statutory provision, the Court has also ruled.

The issue that there was no hearing has been raised by both parties.

The plaintiff contends that the hearing was not a hearing such as due process would require and the defendant argues that the administrative hearing was not only the proper one, but the absolute conclusive one.

With regard to both, as the Court said, provided the notice is given of the subject matter to be heard, an opportunity granted for both sides to be present, to
19 produce facts or make legal argument, so that there is an adversary proceeding, which apparently from this record there was such a hearing, the Court rules that there was a hearing in the sense that a hearing in fact took place.

The Court is going to rule that such a hearing is a lawful and legal one under the statute and under regulation of the Post Office. However, the Court, in the same ruling, is going to rule that the mere holding of such a hearing and the finding by the Postmaster is not absolutely controlling on this Court.

The posture of this case is somewhat unusual. On the date of December 23, 1954, the Postmaster at Mays Landing, New Jersey, gave notice to the plaintiff that the February 1955 copy of Sunshine and Health was to be withheld from the mails. That caused the present action to be instituted on January 6, 1955, in which application was made for a temporary restraining order against such action with the legal arguments based thereon. Then there

was a motion made, that being overruled by this particular Court, there was a motion made for a temporary injunction and that was heard and overruled, so we are in the final stages of hearing this matter on its merits as well as on the application for a final injunction.

In the meantime administrative proceedings began approximately January 17, 1955. So that prior to their institution this particular Court had already been vested with an action which it had jurisdiction of by virtue of the Federal statute, by virtue of the character of this Court, and by virtue of its equity powers. The Court did recognize that the primary step in such cases lay with the Postmaster on the basis, first, that if the magazine was held not obscene, then obviously there was not justiciable issue before the Court, since the impasse to its going through the mails would have been removed by him who is charged with that particular duty.

The hearing before the Postmaster has resulted in a finding that the magazine was obscene.

The Court will rule that beyond the normal objections which give the Federal Court power to review these administrative hearings, and it was the Court's view that as a preliminary step that hearings should be held, since that is where the first ruling should be made, that beyond the normal ruling that the administrative findings shall not be arbitrary and capricious, there is the further ruling that it shall be based on facts sufficient to warrant the conclusion which the Postmaster reached.

In other words, at this particular stage of the hearing in this case, in view of the fact the case was first filed here, the Court is not ousted to hear any matter which may touch on the merits of the case. Accordingly, the Court is going to rule on the defendant's opening statement that the plaintiff has not waived his right to produce testimony, make such argument or take such adversary steps as he sees fit in the present

hearing; that, second, while this administrative hearing is contemplated, it is not conclusive of the matter because the Court still is empowered to review whether the action is arbitrary or capricious, and whether there is any foundation in fact for that particular finding because of the nature of the charge.

The third point which the Court will make on the defendant's opening statement is that in the scope of the statute, being Title 18, Section 1461, in the division of it by the Congress, there was power granted to the Postmaster to determine whether these matters are non-mailable and under the limits as pointed out by the Court that may also become an issue for this Court to decide.

In other words, the Court is not strictly bound by the finding of the Postmaster and that would take care of the third point advanced by the Court that the Court should refuse to accept any construction in determining the issue and be absolutely bound by the finding of the Postmaster.

On that the Court will rule that the Court is not so bound.

Accordingly, it would appear to this Court that the issue that we have before us is whether or not the copy, February 1955, of Sunshine & Health and the copy of Sun Magazine of January-February 1955, on which the
22 amended complaint seeks a declaratory judgment, are obscene. The Court has deliberately done this so as to narrow the issue and preserve all rights to both sides on the rulings and both sides will understand that as the Court has overruled the contentions made on opening statement each ruling is subject to the objection of each respective party.

You gentlemen will aid the Court very considerably if you will refer first to the magazine Sunshine & Health and the Court would be especially interested in the clash of issues which will develop from the pleadings, as to whether

or not the photograph on the outside, the photograph of the child on Page 7, the photograph of the man on Page 9, the photograph of the man on the upper portion of Page 13, the photograph of the woman shown on Page 15, the photograph of the man in the lower left-hand panel on the double page 16 and 17, the photograph on Page 29, come within the purview of this particular section; and with regard to Sun Magazine the photograph on Page 6, the photograph on Pages 8, 9, 11, 13, the photograph on Page 18, particularly of the man, the photograph on Page 19, come within the purview of the statute.

Now continuing, because the Court is deliberately trying to narrow the issue, looking at the finding by the Postmaster, the Court has been carefully over the reading material, the Court does not find in the reading material anything that comes within the purview of the descriptive words of the statute, notably, "obscene," "lewd," "lascivious," "filthy," or "of an undecent character."

I refer particularly to the articles, the stories about the various camps and things of that sort and nature. The Court has a similar impression at the moment as to the silhouettes and figures which appear in trade marks, notably the one on the first page and silhouettes that appear throughout the book, Sunshine & Health, appearing on Pages 26 and 25, that they are not within the purview of the statute, and those silhouettes are not obscene, lewd, lascivious, filthy, or of an indecent character.

I am prepared to hear you gentlemen on the broad issue of whether or not these publications are obscene and do fall within the purview of the statute. Whatever ruling is made is subject to exception by the side as to whom it is proferred.

Mr. Rogge: I appreciate Your Honor's views, even

though I may not agree with them. It will let me concentrate on where I think I can be of most help.

The Court: That is why I have done it. You have been most industrious, I have read two elaborate briefs written by you and you have covered it; you have been before me twice, so those matters have been brought to my attention.

These rulings are not based upon slight or inadequate review, I assure you. They are based on very careful study over the last several weeks.

24 Mr. Rogge: I am convinced of that, if Your Honor please.

Your Honor mentioned about additional evidence. I answered "ready" here this morning. What had gone before in the Post Office hearing was that I had made a motion there to produce live witnesses, live evidence of community standards and that these publications both in text and pictures did not violate the community standards, and also because these are nudist publications, witnesses to testify to the practice of nudism in various areas of American life. Because if we have become a more nude society, it would have a bearing on the question. And I had witnesses prepared to come down. I had a psychologist, Dr. Albert Ellis. I had an art historian, Eugene Thye, to come down and give testimony. And the reason I wanted to do that was because I wanted to make plain for the Court, and I thought in fairness the plaintiffs here were entitled to it, to make clear, and it wasn't quite as sharp as it should be, that the hearings in the Post Office Department in a case like this are conducted in a way so that all the examiner receives and all he really wants to receive are the publications.

In view of Your Honor's mentioning that you would receive additional evidence, I now feel in duty to the plaintiffs here that I must ask Your Honor, I must make the motion whether Your Honor would permit me to show

before Your Honor what I made in my motion to the
25 Solicitor of the Post Office Department. I did not do it before the examiner, but I did it before him, and he ruled adversely.

I now make that motion before Your Honor although I had not intended to do so. I didn't get news of the Solicitor's opinion until 10 o'clock last night, but Your Honor, on this issue, and it is an important issue to these publishers, if Your Honor will hear the evidence on the two items that I have mentioned, I then ask for leave to present it, because I want the plaintiffs to have their best foot forward, and if Your Honor feels this would be of help to him, I would like to offer it to Your Honor.

The Court: I am prepared to rule. The same matter was raised in the case of Sunshine Book Company vs. Summerfield, Civil Action 3007-53, where the proffer was made that psychologists, sociologists, and others, would testify to the cult or society of nudism, and my brother Judge Schweinhaut ruled that that was not relevant or material and the Court of Appeals, while not passing upon the constitutionality direct, or any other phases of the case, made this statement in their opinion of December 16, 1954, in the case of Arthur E. Summerfield, individually and as Postmaster of the United States, appellant, vs. Sunshine Book Company, et al, appellees, on Page 13:

> "In this review of the case it does not become necessary to pass on other questions raised by the
26 appellees to the constitutionality or applicability of this statute as to the propriety of the Postmaster-General's findings that the publications involved in his orders were obscene, (Parmalee vs. United States, 72 U. S. Appeals D. C., 203, 113 Fed. 2d on 729, 1940) or the adequacy of the evidence and record upon which such a finding was based in the instant case."

It is the ruling of this Court that such matter, particularly of the psychologists and the psychiatrists on the cult or society of nudism is not an issue in this particular case. The question before the Court is whether or not these two publications are obscene under the legal authorities interpreting Title 16, Section 1461, and the Court will overrule that motion with an objection noted by counsel.

Mr. Mac Guineas: Your Honor, in order for the record to be clear if and when we get to the Court of Appeals, I should like to ask Mr. Rogge if he has these expert witnesses here in the court room prepared to testify. I do not see them. I am not sure he means whether he is prepared to produce these witnesses on the witness stand or whether he is offering copies of prior statements that they may have made in some prior proceeding and he calls that live testimony.

Mr. Rogge: Your Honor, when I said live testimony—

The Court: I assume you mean a witness on the stand subject to direct and cross-examination?

27 Mr. Rogge: Right, and I do not have them here, but I was offering to bring witnesses who would testify as to current community standards and to be subject to cross examination in this court, but I do not have them here.

The Court: I understand that and my ruling is on the broad aspect of the tendered testimony. If you have live witnesses who will look at these publications, particularly the pictures, photographs, that the Court directed to the attention of counsel, I would be prepared to hear testimony from them touching those particular pictures.

I could almost gather from your brief the extent of the testimony of Dr. Albert Ellis whom you tender and mention by name, because he has been freely quoted in your trial brief on Page 55 and also on Page 56, and I have noted what the others would testify in general, and I do not believe that the issue of nudism as such is before the

Court. It is more in the restricted field of whether the magazines are obscene.

Mr. Rogge: If your Honor please—

The Court: If you have witnesses you want to use today on that issue—

Mr. Rogge: I do not have them here, Your Honor, but I do want to tell you what Dr. Ellis would testify to and I want to follow up Your Honor's statement.

Mr. Mac Guineas: Your Honor, is it relevant?

28 The Court: I assume you are making me a proffer of proof?

Mr. Rogge: Yes.

The Court: Well, make it concise.

Mr. Rogge: Dr. Ellis in testifying about current community standards in the United States will testify that the pictures in Sushine & Health and Sun Magazine do not violate those community standards. His testimony would include that, among other things.

The Court: Give me what other things would bear on the issue of obscenity. I assume his would be the testimony, because you as an able lawyer wouldn't tender him unless he would produce testimony that would negate the averment here that the magazines are obscene; what else would be touching on obscenity—not the cult or society of nudism whether it is good, bad, or whether the public at large should adopt it and what it's attitudes might be in the field of sociology, religion, the rest.

Mr. Rogge: His testimony would cover several phases. And Your Honor being familiar with the prior record knows that, too. He would describe to the Court that there has been growing nudism in American life, for instance, in the home. And he would then end up by taking—he would also cover various other publications on the newsstand. He would refer to such publications as Life, for instance, which has also carried nude pictures—

29 The Court: I can help you there. I have been a regular reader of Life, and subscriber, since it began. I have been reading the National Geographic magazine for 40 years.

Mr. Rogge: That would be another one he would refer to.

The Court: I don't recall that there were ever pictures of the nature and character of those that I have directed to counsels' attention in both magazines here.

Mr. Rogge: He would refer to such film as La Tuka which has been showing. There you do have film showing—I have not seen it, but I understand it shows complete nudes. It is true it is of an African tribe, but I don't think that makes any difference. It is shown to audiences in this country.

The Court: I don't think your point is well taken. This particular Court is a shellback, I have crossed the equator, I know temperature in Brazil is 120, Yuma, Arizona, 120; and the strange part is the natives in both those places seem to wear more clothes than we do in the City of Washington in January. So far I don't believe that the tender of Dr. Ellis' testimony that nudism is growing within the homes—

Mr. Rogge: Within American life.

The Court: To demonstrate. What are the Washington mores or the New Jersey mores or the American continental mores; I do not believe it would be relevant or competent. I do not believe and will rule that his testimony as to what certain aboriginal tribes or people of society

30 living on the tropical belts would be relevant here. What else would he testify?

Mr. Rogge: I think Your Honor misunderstood me here. For instance, let's go back to the film La Tuka. His testimony would be to the effect that these things being current in American life, such a film is shown here, audiences also look at it.

The Court: You mean in the District of Columbia?

Mr. Rogge: I don't think the film has been shown here, but it was shown in New Jersey and other places.

The Court: Our police maintain fairly good surveillance of films and other public shows. I would doubt that they would ever show it in the Nation's capitol but I will rule again that that tender would not be relevant, material, or competent.

What else would he testify to?

Mr. Rogge: For instance, the film was shown in New Jersey and that is where it was sought to mail these publications.

We get into another area now, and this is one of the difficulties with the word "obscene," whether something is obscene in one part of the country and not in another.

The Court: I don't think we will have any trouble between Mays Landing and Washington, D. C.; I have been in both and the people all look alike, they are all standard, every-day American variety.

31 Mr. Rogge: If we go to New Jersey, I can tell you the film La Tuka has been shown and has been ruled not to be obscene.

The Court: We can do better than that, we have had films start up in the District of Columbia and get past surveillance and not be challenged, but that doesn't prove that the people accept it or that it is proof of the mores of the people.

Is there anything else he would testify to? I don't want to limit your proffer of proof.

Mr. Rogge: He would testify, if Your Honor please, in addition to what I stated, along the lines of the affidavits which were attached to the complaint before Judge Schweinhaut.

The Court: And which I have read and on which I am predicating my rulings now. I mean I have been over that.

Mr. Rogge: Well, beyond the items covered in that affidavit and the items that I have stated here this morning, that would be the substance of his testimony, if Your Honor please.

The Court: Very well. Well, now, you proceed on the basis of the issues now framed. If you have anyone in court that can testify on it, I have no objection to hearing their testimony or knowing the purport of what the testimony would be, and especially against the legal standards, I am prepared to hear it.

Mr. Rogge: If Your Honor please, I do not have
32 the witness here. If I had Dr. Ellis or Eugene Thye —in the case of Eugene Thye, what he would testify to, he would testify to nudism in art, photography, art classes in various parts of the country; he would relate to Your Honor various famous nudes in art which are in various galleries.

I do not have either one of these witnesses here, but if I had them here, this is what they would testify about, and if Your Honor will permit that testimony to be added to the record then I still repeat to Your Honor that I would like to bring those live witnesses here even though that would mean an adjournment, because I do not have them here.

The Court: No, I don't believe that the tender on behalf of the plaintiff of Mr. Thye's testimony is going to be relevant. The Court is not a connoisseur of art, but I have been in hundreds of art galleries in the United States and Europe, I have seen a great many statues in the Louvre, Rome, the Vatican, and our own galleries; I know the mores I believe as a fair and reasonable person, and I don't think that would bear upon whether these pictures that we are involved with are obscene.

Accordingly, on the proffer I will overrule it as not being relevant and material, subject to your objection. I want your record to be complete.

Mr. Rogge: Right. So do I, if Your Honor please.

The Court: And don't forget the Court has had
33 benefit of seeing these very elaborate affidavits in the prior case. It has been made a part of the record.

Mr. Rogge: I can see that Your Honor has, and I appreciate that, too.

All I can ask as counsel is that I be heard, and whether that is orally or in writing, if the Court has considered my arguments—that is all I can ask for. If I have not convinced Your Honor, I have done what counsel for the plaintiff should do, and there it rests, and I appreciate Your Honor's approach here.

This brings us, then, far quicker than I thought we would get there to the issue of obscenity. Here I do want to meet counsel for the defendant headon. He tells Your Honor that on the question of obscenity you need an informed judgment. The courts disagree on this, people disagree, so the Postmaster-General is going to decide for all of us. In a Harun al Rashid fashion, if Your Honor please, he is going to decide for the whole country what they may read, what they may see, what they may not see.

However that is phrased whether you are going to call that informed judgment or not, what it means is that he wants to become what our courts have always said an official should not be. He is going to be a censor for us.

* * * * *

39 The Court: Before you leave that field of the ability of a court to judge, the Court does feel it should be the standard of the normal, reasonable person acquainted with the mores of the community and based upon, of course, the legal definitions that we have from our case law, and the Court would draw on his own knowledge, association with the Young Mens' Christian Association for almost 30 years as a member and director and counsel.

* * * * *

Ruling by Judge Kirkland Denying Motion for Temporary Injunction

65 Washington, D. C.
Monday, January 31, 1955.

RULING FROM THE BENCH on MOTION FOR PERMANENT INJUNCTION by the Hon. James R. Kirkland, Judge.

* * * * *

The Court: There is before the Court the case of Sunshine Book Company, plaintiff, versus Arthur E. Summerfield individually and as Postmaster General of the United States, defendant, in Civil Action No. 74-55.

The complaint was originally filed January 6, 1955, and there has been an amended complaint filed on January 18, 1955. They differ in only one slight particular. The gravamen of the complaint of January 6, 1955, was directed to injunctive relief sought by the plaintiff against the
66 impounding of some 400 copies of the magazine Sunshine & Health for February, 1955, at the Mays Landing, New Jersey, Post Office, and, as well, a separate claim for declaratory judgment that this particular magazine was not obscene.

The amended complaint also has attached as an exhibit Sun Magazine of the issue of January-February, 1955, and seeks in a third claim a declaratory judgment that the character of that magazine is not obscene in fact.

Historically, the facts of this case indicate that on approximately December 23, 1954, the Postmaster of Mays Landing, New Jersey, Post Office, gave notice to the depositor, namely, the plaintiff here and subsidiary groups including Solar Union Naturisme, Inc., that the deposit of these magazines on instruction of the Postmaster General were being withheld from the United States mails.

At the same time notice was given of an administrative

hearing before the Solicitor for the Post Office Department. The hearing began on January 17, 1955, and after several postponements has proceeded to a conclusion and there has been filed in the action of this case today
67 the administrative finding of the Postmaster through his subordinates the trial examiner and the Solicitor for the Post Office Department, and that finding has been that the "review of the entire official record • • • upon substantial evidence • • • indicates that the magazines in question contain photographs of naked men, women and children, principally women, clearly revealing genitals, breasts and other portions of the body normally covered in public." It concludes that, "From the advertisements therein contained, that they are offered freely for sale," and the Post Office Department through its officials in this hearing has made a finding of fact that "The photographs appear obscene and indecent when judged by the ordinary community standards of the vast majority of citizens of this country."

Continuing with the historical portion of the case, there was filed at the outset with the complaint of January 6 a motion for a temporary restraining order. That was heard briefly and denied, and a date was set for the hearing of the temporary injunction, which upon hearing was likewise denied, and so it was brought up until this date, January 31, 1955, for the determination of the then pending status of the case on the final injunction.

At the time this particular Court heard the argument of the motion for a temporary injunction one of the issues raised was, and properly raised, that the adminis-
68 trative remedies had not been exhausted. The Court heard argument on both sides of the question and concluded, from the Congressional enactments and the customs and procedures followed, that the initial determination under Title 18, U. S. C. Section 1461, the obscen-

ity statute, lay with the Postmaster General, and accordingly the Court gave directions that that should first be settled and disposed of, as the record now reveals it has been, and then the matter on the nature of the finding, as well as the question raised by the pleadings, would be decided today.

Accordingly, on the record of the case, including the the pleadings, the affidavits appended, affidavits appended to Civil Action 3007—53, the Court on opening statements has narrowed the issues of this particular case.

The Court has ruled that there is provision under this statute, Title 18 U. S. C., Section 1461, for the Postmaster General to conduct hearings and examinations into the alleged obscenity of publications, pamphlets, pictures, papers, letters, prints or other publications; that Title 18 U. S. C., Section 1461 is not unconstitutional; and due process under the Fifth Amendment was provided for by a hearing in which either testimony or review of the magazines and the pictures contained therein by visual observation, and the helpful argument of counsel did constitute a proper hearing within that provision. The Court
69 has also ruled that under Title 18 U. S. C., Section 1461, there is not a denial of the provisions of the First Amendment to the Constitution.

The Court also ruled preliminarily that the administrative hearing was one contemplated by the Congress and one carried out properly by its designated agent, the Postmaster General; that the scope was not essentially criminal in character, though criminal provisions are applied because the statute carefully declared that whatever was obscene, lewd, lascivious, filthy or of an indecent nature as it applied to any book, pamphlet, picture, paper, letter, print or other publication should be declared not to be mailable and should not be conveyed in the mails or delivered from any post office or by any letter carrier; that

the Court was not confined to a mere determination of whether the finding of the Postmaster General from his hearing was arbitrary and capricious but that the Court in the status of this case which antedated the actual finding in the proceedings themselves, as well as the review of the proceedings, had the right to pass upon whether there was a foundation for the Postmaster in his finding that these two publications were obscene.

That left open the sole question of whether the two publications were obscene as a matter of fact and as a matter of law.

Counsel have very ably presented the matter. They have been very careful to indicate their industry, and
70 their deep professional learning.

Accordingly, we are in the posture of determining the standards by which to judge these particular magazines.

First of all, nudity is not, per se, obscene, as the case of Parmelee versus the United States, from our own circuit, reported in 113 Fed. 2d 729, was clear to point out. However, we must steer a course, in the clash of these legal interests, between what is art on the one hand, pornography on the other; what is decent on the one hand as against what is indecent on the other; and what is conformity to the mores of the District of Columbia, the State of New Jersey and America in general. Accordingly, we must first consider the definitions which have been handed down in interpreting the mandate of Congress.

Title 18 U. S. Code Section 1461 lays down five descriptive adjectives of what will constitute the basis of obscenity in general. Congress has used the words, "obscene," "lewd," "lascivious," "filthy" and "indecent" and has applied them to books, pamphlets, pictures, papers, letters, prints and other publications.

This, of course, is a magazine. It is a publication. There

are contained within it pictures. Accordingly, in that aspect of the statute, this Court has jurisdiction.

It is declared if they are found to be obscene they are to be non-mailable, they are not to be transported or
71 conveyed in the mails, and they are not to be delivered from any post office or by any letter carrier.

Those parts are clear and do not need definition. But there is a need of definition as to what the Congress meant in the employment of the five adjectives.

In connection with the definition of "obscene" the Supreme Court in Dunlop versus United States, 165 U. S. 486, 17 Supreme Court 375, 41 Law Edition 799, has declared that obscenity or the adjective "obscene" must be calculated to lower that standard which we regard as essential to civilization or calculated with the ordinary person to deprave his morals or lead to impure purposes.

In the case of United States v. One Obscene Book Entitled "Married Love", 48 F. 2d 821, from the Southern District of New York, decided in 1931, the Court there declared that obscenity means to be offensive to the senses or to the taste, refinement; disgusting, repulsive, filthy, foul, abominable, loathsome, offensive to modesty or decency, expressing or suggesting unchaste or lustful ideas; impure, indecent, lewd.

In our own local case, Parmalee v. U. S. 72 Appeals D. C. 203, 113 F. 2d 729, decided in 1940, the Court said, and I quote: "Obscenity is not a technical term of the law and is not susceptible of exact definition. Probably the fundamental reason why the word is not susceptible of exact definition is that such intangible moral concepts as it
72 purports to connote vary in meaning from one period to another."

In the case of United States v. Two Obscene Books, 99 Fed. Supp. 760, from the District Court of California, decided in 1951, the Court indicated that the definition of

"obscene" is: Offensive to chastity and modesty; that form of indecency which is calculated to promote the general corruption of morals; has a tendency to deprave or corrupt the morals of those whose minds are open to such influences and into whose hands it may fall by allowing or implanting in such minds obscene, lewd, or lascivious thoughts or desires.

Passing on to the second word which appears in the statute, namely, the word "lewd", it has been defined in United States versus Slenker, 32 F. 691, as having a tendency to excite lustful thoughts,

In the case of United States versus Males, decided in 51 Fed., page 41, the word "lewd" has been defined as licentious.

The third word is the word "lascivious." In the case of United States v. Clarke, 38 Fed. 732, that word was defined as synonymous with "lewd"; dissolute, unchaste, calculated to excite lustful and sensual desires in those whose minds are open to such influences.

In the case of Swearingen v. United States, 161 U. S. 446, it was defined as: Tending to excite lust; lewd, indecent; obscene; relating to sexual impurity; tending
73 to deprave the morals in respect to sexual relations.

The fourth word is the word "filthy." That has been defined in United States v. Davidson, 244 F. 523, as: Morally foul, polluted, nasty.

In the case of Tyomies Publishing Company versus United States, 211 F. 285, it was defined as: Dirty, vulgar, indecent, offensive to the moral sense, morally depraving, debasing.

In the case of United States v. Limehouse, 285 U. S. 424, it was defined to mean matter that, though not lewd or obscene, it nevertheless had a tendency to corrupt or debauch.

The definition of the last of these five adjectives, the

word "indecent," has been stated in United States versus Davidson, 244 Fed. 523, to be: Offensive to common propriety; offending against modesty or delicacy; grossly vulgar, obscene, lewd.

And in the case of United States v. Smith, 11 Fed. 663, the word "indecent" is defined as: Immodest, impure.

Those definitions are the beacons by which the legal channel is lighted for the Court to arrive at findings of fact and conclusions of law in this case.

Next, it is clear that under the law, as the tryer of the facts, the Court is to apply the test of the normal, reasonable person, and the findings are to be predicated
74 upon his—that is, the normal, reasonable, prudent person's—determination.

In the case of Walker versus Popenoe, reported at 80 Appeals D. C. 129, 149 F. 2d 511, particularly with regard to the law on obscenity and the tests applying thereto, our Circuit Court of Appeals at page 512 stated that there should be three classifications, and laid them down by way of tests, as follows:

First, "The effect of a publication on the ordinary reader is what counts. The statute does not intend that we shall 'reduce our treatment of sex to the standard of a child's library in the supposed interest of a salacious few.'"

Second, "The statute does not bar from the mails an obscene phrase or an obscene sentence. It bars an obscene 'book, pamphlet or other publication * * *' If a publication as a whole is not stimulating to the senses of the ordinary reader, it is not within the statute."

Third, "It would make nonsense of the statute to hold that it covers works of value and repute merely because their incidental effects may include some slight stimulation of the senses of the ordinary reader. The dominant effect of an entire publication determines its character."

As was pointed out in the case of Parmelee versus United States, 72 Appeals D. C. 203, 113 Fed. 2d 729, the modern rule was restated with emphasis, and at
75 page 731 the Court said, and this trial court quotes:

"But more recently this standard has been repudiated, and for it has been substituted the test that a book must be considered as a whole, in its effect, not upon any particular class, but upon all those whom it is likely to reach."

It has been urged upon the Court that the finding of my brother Judge Henry Schweinhaut, in the case of Arthur E. Summerfield, individually and as Postmaster General, Appellant, versus the Sunshine Book Company, et al., decided December 16, 1954, No. 12.026 by the United States Circuit Court of Appeals for the District of Columbia Circuit, is controlling both as to the law and the facts in this particular case, both on the doctrine of stare decisis and res judicata.

The Court rules that on the doctrine of stare decisis it is not controlling for the reason that the standards of that case by which another court could judge the findings are not set forth, and is actually complained of in the majority view of the Circuit Court of Appeals when the majority states, "In this view of the case it does not become necessary to pass upon other questions raised by the appellees as to the constitutionality or applicability of this statute as to the propriety of the Postmaster General's finding that the publications involved in his orders were obscene (See Parmelee versus United States, 72 U. S. Appeals, D. C. 203, 113 Fed. 2d 729, 1940) or" —and the Court with emphasis adds— "or the adequacy of
76 the evidence and the record upon which such a finding was based in the instant case."

There the Postmaster General made a very short finding unlike the finding he has made in the instant case. He

merely found that some 25 copies of magazines of the same publication issued in the years 1952 and 1953 were obscene. My brother Judge Henry Schweinhaut merely stated that with that he did not agree, and he found and signed an order on a sole finding of fact that the magazines were not obscene.

It was in that posture that the case went to our Circuit Court of Appeals, and the majority very properly ruled that under Title 18, Section 259 (a), where a postmaster at a local station had indiscriminately withheld money orders and general mail which could touch both a lawful or unlawful purpose or legal or illegal purpose, he had exceeded his bounds, and this Court interprets the majority view as not binding upon whether subsequent issues of the same magazine might be obscene in fact.

The dissenting view of appellate case is strong that all of those magazines were obscene both in law and in fact.

There is also the case of Sunshine Book Company versus McCaffrey, cited at 112 New York Supp. 2d 476, where in passing upon the seizure of the same magazine from the newsstands in New York City in the year 1952, and where it was sought by injunctive powers to lift the ban
77 which the Commissioner of Licenses of New York City had applied, that court held that the same type of magazines—Sunshine & Health and Sun magazine—were obscene, and particularly pointed to the fact that on the front page there was a picture of a nude woman which clearly showed the pubic area. That particular court repudiated the Parmelee case from our own Circuit.

This Court points to the decision in the case of Arthur E. Summerfield versus Sunshine Book Company, et al., No. 12026 as not controlling on this doctrine of stare decisis.

On the question of res judicata, for the reason that there was no clear showing what the basis was for the

finding by the Postmaster that the magazines were obscene nor the finding by the trial court that they were not obscene, the Court in this particular instance is not bound by the decision in the former case on the doctrine of res judicata. The matter is clearly before the Court for a determination.

The Court has set forth the legal beacon lights that will guide its course in the determination of whether a book, pamphlet, picture, paper, letter, print, or other publication is to be judged, and will make the following findings of fact and conclusions of law as respects the magazine Sunshine & Health, February, 1955, Vol. 23, issue No. 2, and the Sun Magazine, January-February 1955, being volume 5 and issue No. 1.

First and foremost, nudity is not obscene, per se,
78 There are a series of silhouettes which appear in this publication of Sunshine & Health. They depict the human female form in a broad outline. The Court will hold as a fact that they are not obscene.

There are some sketches in the issue of Sun Magazine which are broad pen sketches, and while they reveal the general outline of the female form, the Court will also hold that those sketches, because of their indefiniteness, of failure to emphasize any particular part of the male or female genital area, are not obscene as a matter of fact.

The articles which appear do not contain vulgar or obscene matter, and the Court will hold that they are not obscene as a matter of fact.

The Court will also hold that the American people are a clothed race, that under our Constitution the views of others are always permitted, and that progress comes out of some of those views and aids, generally, all the citizens.

The Court will hold that nudism in its present stage is a cult or a society or a group that represents a very small minority of the American people.

The Court will also hold that, from acceptance of the majority in works of art, in medical and scientific journals, books, magazines and literature, religious articles and the like, pictures which show the human form merely in the nude and beyond that not revealing the pubic area
79 **or the male or female genitalia, are not obscene.**

The Court will also hold as a fact that posterior views of nudes, be they male or female, young or old, whether photographed or sketched at short or long distances, are not obscene as a matter of fact. Views taken from the side of nude persons, male or female, young or old, that do not reveal the genitalia or the pubic area, are not obscene. Where the one photographed or sketched, or whose likeness is reproduced on parchment or paper, or canvas, makes concealment of the pubic area by his or her limbs or by objects, or where the area is concealed by shadow, such pictures are not obscene as a matter of fact. Pictures taken at sufficient distance, although being a front view, are not obscene. It depends upon the distance of the camera's focus or the projection of the artist or the one who is sketching the scene—the distance as projected from the viewer's eye.

Where the artist or the photographer obscures by shadowing, by retouching photographic plates, or by concealment or obliteration of the pubic area, though it reveals all other formations of the nude body, male or female, young or old, that is not obscene as a matter of fact.

Where children are photographed in a frontal view which reveals the diminutive and undeveloped genitalia, that is not obscene as a matter of fact.

It is difficult to lay down a hard and fast rule
80 **but certainly, drawing upon the criminal rule as an analogy, children below the age of seven photographed in such condition do not exhibit a picture which is obscene, lewd, lascivious, filthy, or of an indecent nature,**

by virtue of their age of innocence, the under-development of their genitalia, and the common acceptance of the American people of such views.

Between the ages of seven and fourteen, when the children undergo rapid development, and especially in the warmer portion of our country, there, of course, because of the development which occurs in the pubic area, which is a small portion of the human anatomy characterized by pubic hair in both sexes, and where genitalia are also intimately revealed, it may or may not, depending upon the distance, the obliteration, the shadowing and the like, be obscene as a matter of fact.

Where photographs are taken of the pubic area at very close range they are as a matter of fact obscene, and, it will follow, as a consequence, as a matter of law, obscene.

As to the female breast there is always the problem of the acceptance of its exposure by the majority of the American people. The organ, of course, is one of nutrition for young, expanding during periods of pregnancy and reducing in size when the state of non-pregnancy and the nurture of the young child has no longer required its function.

81 The public is, therefore, accustomed to the view of the nursing mother and has not found it to be indecent or obscene. Since the ancient past there have been many periods of years when, as to the form of dress worn by the female, the plunging neckline has been accepted in the mores of the people, so that the revealing of the breast would not in itself be obscene. However, its accentuation, its distortion, or its grossness could, under the broad definition, depending upon the situation, make it filthy or might make it indecent.

Of course, the Court is not touching upon the question which would appear to be the fact, that sometimes partial concealment adds to allure, because the pictures involved

in these cases, where they run against the standards the Court has indicated, are not pictures where there is concealment.

Accordingly, against those broad findings of fact the Court will make these particular findings of fact.

On the outside cover of Sunshine & Health Magazine for February, 1955, there is a close view of a young woman apparently in her early twenties. There is no show of the pubic area and there is no show of the genitalia by the angle at which the picture is shot. While the shadowing on her chest is grotesque and indicates a bosom larger by far than normal, it is shot at such an angle as to elongate and make quite massive the breast as distinguished from the very small nipple. While it gives an effect, in
82 general, of grotesqueness by the tests which the courts have laid down, it is not obscene under the test of this statute.

There is a picture of a young girl on page 7. She appears to be approximately six or seven. It is a frontal view taken within a very short range of approximately 6 feet. She is swinging on a swing, facing the camera. While the labia majora are shown, they are diminutive and juvenile. One would have to be prudish to hold that that was an obscene picture. The Court does not hold it as a fact and rules that it is a picture that does not contravene this statute.

On page 9 there is a picture of a man on water skiis, taken at some distance. His genitalia are clearly revealed, appearing in the center of the picture. The Court is going to hold that by the closeness, the detail that can be seen, that that is an obscene picture within the purview of the statute.

There is a picture shown at the upper portion of page 13. This is a picture of two persons, a woman seated beside a pool and a man standing to her side. The woman, by the crossing of one leg partly over the other, has ob-

scured the pubic area and genitalia, and hers is not an obscene picture. The man, on the other hand, is standing with a side view. By artful use of shadow his face is completely obliterated, his entire pubic area is obliterated by the shadow, but prominently shown in front of
83 the pubic area and against this dark background is his male organ; the corona of the penis is clearly discernible; in fact, even a casual observation of it indicates that the man is circumcized. This obviously has no place even in illustrating the principles of nudism. It is filthy, it is foul, it is obscene, and the Court will hold such as a matter of fact.

On page 15 there are four middle-aged women with their backs to a very large oak tree, appearing to be some 12 feet in diameter. They are holding hands and facing the camera. Only two of these women are revealed to the viewer. The woman to the left is a woman of middle age. She has very large thighs. The pubic hair is clearly shown. Her right thigh is particularly noticeable because, though there are trees nearby, the formation which appears on the thigh is not that of shadow, it appears to be matted varicose veins that cause her to be grotesque, vile, hold her up as an object of scorn, and the Court will hold under the statute that that is filthy, and that it is indecent. That is also true of the woman in the foreground who, while in not as much sunlig... as the other, nevertheless clearly reveals her pubic area as she stands within approximately 6 feet of the camera.

On page 16, in a mixed group, there is one man revealed at the corner where his genitals are clearly shown, and the Court will rule as a matter of fact that that is obscene.

On page 29 there is a most unusual picture.
84 Here are two women who appear to be in their late twenties or early thirties. The woman to the left

appears to be approximately 5 foot 7. She must weigh in the neighborhood of 250 pounds. She is exceedingly obese.

' I assume the illustration, not retouched by the photographer, is to represent the normal, natural person and reveals her as she was in fact when the picture was taken. This picture was taken within approximately 12 feet of the camera. First of all, so far as the demonstration of nudism goes, the picture shows a very clear sunburned "V" at her neck—V-shaped sunburn—whereas the rest of her skin is white as the snow on which she stands. The Court might gather she is a new member or a nonconformist. She has large elephantine breasts that hang from her shoulders to her waist. They are exceedingly large. The thighs are very obese. She is standing in snow, wearing galoshes. But the part which is offensive, obscene, filthy and indecent is the pubic area shown.

Being most liberal, one might say that the area shown of the pubic hair is caused by shadow, but the same is not to be noticed on both sides. The hair extends outwardly virtually to the hipbone. It looks to the Court like a retouched picture because the hair line instead of being straight is actually scalloped or in a half-moon shape, which makes the woman grotesque, vile, filthy, the representation is dirty, and the Court will hold that that picture is obscene in the sense that it is indecent, it is filthy, and it is obscene as a matter of fact; because of the closeness of the view the woman to her left and the viewer's right is likewise held to be obscene.

The intent of the photographer and publisher is clearly shown by those prior pictures, because on page 17, standing within 8 feet of the photographer, is a male figure. Although the outline of his body is shown, the pubic area and genitalia are completely blocked out, revealing a picture under one condition there, and showing pictures

under different conditions, as pointed out by the Court, and the Court points to that fact and holds that the latter pictures were thus reproduced intentionally.

With regard to Sun Magazine against the standards set forth, the Court will hold that the picture of the young girl photographed on page 6, standing wtihin approximately 6 feet of the camera, showing the pubic area, is obscene; that it is lewd, lascivious, and tends to incite lust and sensual ideas; that the two pictures shown on pages 8 and 9 of a young girl in her early twenties standing within short range of the camera, approximately some 8 to 10 feet, in a frontal view showing the clear detail of the pubic area, are obscene.

On page 11 there is a picture of three females with the caption, "Mrs. Nudism of 1954 and Two of Her Ten
86 Children." The two girls who appear with her are in their early 'teens. The mother is obese, short, stocky, has large flat breats; the pubic area is somewhat shaded by shadow; the pubic hair is matted; the over-all picture is one of vulgarity, filth, obscenity and dirt. But the photographer in taking this picture has caused the two girls to turn to a side view and the sunshine clearly shows the fine, soft texture of pubic hair of the adolescent girls, and accordingly the Court finds the picture is obscene, lewd, and lascivious.

There is shown on page 13 a picture of a woman in her early twenties. She is standing in a three-quarter pose within 6 feet of the camera. There is a woman to the side holding a large inflated ball of some sort. The sun and the said ball have cast a shadow upon the body of the other woman. While it is suggestive, it, nevertheless, by the distance, the posture and the elimination through the shadow of the pubic area, is not obscene.

There is a sketch on page 19 of Sun Magazine which does not show in any great detail the pubic area of the two

females shown tossing a large ball, and the Court finds that the drawing is not obscene:

There are pictures taken within an approximate range of 15 feet of the camera, in the surf, showing two nude couples. The women are obscured by the waves. The man in the foreground has completely revealed his male
87 genitalia, and the Court will hold that that is obscene.

There is a suggestive picture on page 23—what appears to be a Mexican, a woman of Mexican birth, a very dark complexioned woman. But the shadows in the scene obliterate the pubic area, and the Court will hold that that is not obscene as a matter of fact or law.

There is a picture taken of a group at some great distance watching an exhibition of judo or wrestling, on page 29, but by virtue of the distance at which that picture is taken the Court will hold that it is not an obscene, lewd or lascivious picture.

Accordingly, the Court concludes as a matter of fact that the pictures fall within the standards as the Court has indicated in its findings, and concludes as a matter of law that the right of the Postmaster to have made his initial findings as he did is established by the cases. The statute does not thwart the principles of the First Amendment or the Fifth Amendment; that there was foundation in fact for his findings, and review of the entire official record and of the initial decision by the Post Office Examiner, and discloses no erroneous findings of fact nor conclusions of law; the initial decision was founded upon substantial evidence and contains correct rulings, findings of fact and conclusions of law upon all material issues. These
88 magazines contain photographs of naked men, women and children—principally women—clearly revealing genitals, breasts and other portions of the body normally covered in public. It is apparent from adver-

tisements therein contained that they are offered freely for sale to the general public who are not members of the nudist organization. The photographs appear to be obscene and indecent when judged by the ordinary community standards of the vast majority of the citizens of our country.

The postmaster at Mays Landing, New Jersey, will, accordingly, be instructed to treat the February 1955 issue of Sunshine & Health and the January-February issue of Sun (Solaire Universelle Nudisme) as non-mailable.

The Court finds from the record, from the standards, that there was basis in fact and in law for the conclusion of the Postmaster General, and accordingly will sustain him in that view. The Court will conclude as a matter of law that since the dominant theme of both magazines, by the findings of fact, is clearly one of obscenity, the Court will direct first that the motion for a permanent injunction as against the action of the Postmaster General in withholding 40 copies of Sunshine & Health, February, 1955, will be dismissed with prejudice, and disposition of those copies, depending upon an ultimate determination, will proceed in accordance with postal regulations. On
89 the amended complaint in the third claim seeking a declaratory judgment on Sun Magazine, January-February 1955 issue, the Court will enter judgment for the defendant in the cause and will find as a fact that the magazine is obscene within Title 18 U. S. Code 1461.

Counsel will prepare suitable findings of fact and conclusions of law.

Mr. MacGuineas: Your Honor, in view of your extensive opinion and the fact that the rules permit the findings of fact and conclusions to be contained in the opinion, I would suggest that from our point of view separate findings and conclusions are not necessary. Of course, if you desire them, we will be happy to submit them.

The Court: You should follow your best judgment, but I want to get the record complete by the findings, and you can either order a transcript and adopt it; or present an appropriate order and findings to cover it, or take whatever action you desire.

Mr. MacGuineas: And I shall submit a form of judgment.

The Court: Yes.

* * * * *

Findings of Fact and Conclusions of Law

413 (Filed February 16, 1955)

This cause coming on to be heard on the application of plaintiffs for permanent injunction and for a declaratory judgment, the court, having heard arguments of the parties, makes the following findings of fact and conclusions of law.

Findings of Fact

1. Sunshine Book Company is a non-profit New Jersey corporation which publishes Sunshine & Health magazine as a monthly periodical.

2. Solar Union Naturisme, Inc., is a non-profit New Jersey corporation which publishes Solaire Universelle de Nudisme magazine (usually referred to as Sun magazine) as a bi-monthly periodical.

3. Printing of the February 1955 issue of Sunshine & Health was completed on or about December 23, 1954, and between December 24 and 31, 1954 400 copies were submitted by Sunshine Book Company to the Mays Landing (New Jersey) Post Office for mailing as third class matter.

4. By letter of December 31, 1954, E. J. Turpin, Postmaster at Mays Landing, advised Sunshine & Health
414 magazine that the Solicitor of the Post Office Department had requested him to inform it that the February 1955 issue was being withheld from dispatch because nonmailable. At the same time, Sunshine & Health was told that it was entitled to an opportunity to be heard as to the nonmailability of the February 1955 issue under the provisions of 39 CFR 36.2.

5. By letter of January 6, 1955, Sunshine Book Company was advised that the hearing was to be held at 10 a.m., January 10, 1955, at the Post Office Department, Washington, D. C., before the Chief Trial Examiner to determine the mailability of February 1955 issue of Sunshine & Health and that in the event of an adverse decision the company might appeal to the Solicitor of the Post Office Department.

6. By letter of January 6, 1955, Sun magazine was given notice that a hearing was to be held at 2 p.m., on January 11, 1955, in the Post Office Department, Washington, D. C., before the Chief Hearing Examiner to determine the mailability of the January-February 1955 issue of Sun magazine under the provisions of 18 U. S. C. 1461. This letter advised that the initial decision of the Hearing Examiner was subject to an appeal to the Solicitor of the Post Office Department.

7. The hearing was held before Chief Hearing Examiner James C. Haynes on January 17, 1955, having been postponed to that date to accommodate counsel for plaintiffs. Plaintiffs appeared by counsel. At the hearing, copies of the magazine were offered in evidence and plaintiffs made offers of testimony consisting of records made in earlier proceedings involving earlier issues of these same

magazines, which were rejected by the Hearing Examiner. Plaintiffs' counsel submitted oral argument and a written brief.

8. On January 18, 1955, the Court denied plaintiffs' motion for a temporary injunction on the ground the
415 administrative remedy before the Post Office Department had not been exhausted.

9. On January 20, 1955, the Chief Hearing Examiner of the Post Office Department rendered his initial decision and recommendation that the February 1955 issue of Sunshine & Health and the January-February 1955 issue of Sun magazine were obscene, lewd, lascivious, filthy, and indecent and therefore nonmailable. He found as a fact that the photographs in these magazines appeared obscene and indecent when judged by the ordinary community standards of the vast majority of citizens of the United States.

10. On January 28, 1955, the Solicitor of the Post Office Department affirmed the Hearing Examiner's initial decision.

11. Sunshine & Health and Sun magazines are freely offered for sale to the general public.

12. The text of the magazines in question, silhouettes depicting the human female in broad outline, and the sketches in Sunshine & Health showing the general outline of the female form are not obscene, lewd, lascivious, filthy, and indecent.

13. The issues of Sunshine & Health and Sun here in question contain numerous photographs of naked men, women and children—principally women—clearly revealing genitals, breasts and other portions of the body normally covered in public.

These photographs are obscene, lewd, lascivious, filthy and indecent, and, since these photographs constitute the dominant note of the publications, these issues of the magazines are obscene, lewd, lascivious, filthy and indecent.

14. Nudism in its present stage is a cult or a society or a group that represents a small minority of the American people.

416 CONCLUSIONS OF LAW

1. 18 U. S. C. 1461 authorizes the Postmaster General or his delegate to determine, after notice and hearing, whether any publication is obscene, lewd, lascivious, filthy or of an indecent character and therefore nonmailable, and upon such determination to refuse to convey in the mails any such publication.

2. 18 U. S. C. 1461 as so construed is not of doubtful constitutionality.

3. The administrative hearing given the plaintiffs in this case did not deprive them of due process of law under the Fifth Amendment to the Constitution.

4. The determination of the Solicitor of the Post Office Department that the February 1955 issue of Sunshine & Health magazine and the January-February 1955 issue of Sun magazine are obscene, lewd, lascivious, filthy and indecent within the meaning of 18 U. S. C. 1461 is supported by substantial evidence and is not arbitrary and capricious.

5. Alternatively, the February 1955 issue of Sunshine & Health magazine and the January-February 1955 issue of Sun magazine are, as independently determined by the Court, obscene, lewd, lascivious, filthy, and indecent and hence nonmailable within the meaning of 18 U. S. C. 1461.

Judgment therefore will be entered in accordance herewith.

JAMES R. KIRKLAND
United States District Judge

Dated: February 16, 1955

Judgment Dismissing Amended Complaint

417 This cause coming on to be heard on the application of plaintiffs for permanent injunction and for a declaratory judgment;

And it appearing, in accordance with the Findings of Fact and Conclusions of Law made by the Court in this cause, that the administrative procedure followed by the defendant in this action is in conformity with 18 U. S. C. 1461; that the action complaint of is not violative of any Constitutional right of plaintiffs; that the finding by the defendant that the February 1955 issue of Sunshine & Health magazine and the January-February 1955 issue of Sun magazine are obscene, lewd, lascivious, filthy or indecent and nonmailable within the meaning of 18 U. S. C. 1461 is supported by substantial evidence and is not arbitrary or capricious; and that plaintiffs are therefore not entitled to any relief; it is hereby

ORDERED, ADJUDGED AND DECREED, That the complaint as amended be dismissed with prejudice.

JAMES R. KIRKLAND
District Judge

Dated February 16, 1955

Notice of Appeal

418 (Filed February 17, 1955)

Notice is hereby given this 17th day of February, 1955, that Sunshine Book Company and Solar Union Naturisme, Inc., plaintiffs hereby appeal to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 16th day of February, 1955 in favor of defendant against said plaintiffs.

O. John Rogge
Attorney for Plaintiffs
401 Broadway
New York 13, N. Y.

Copies mailed to:

D. B. MacGuineas

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JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1957

No. 587

SUNSHINE BOOK COMPANY AND SOLAR UNION NATURISME, INC.,

Petitioners,

—against—

ARTHUR E. SUMMERFIELD, Individually and as Postmaster General of the United States,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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IN THE

Supreme Court of the United States

October Term, 1957

No.

SUNSHINE BOOK COMPANY AND SOLAR UNION NATURISME, INC.,

Petitioners,

—against—

ARTHUR E. SUMMERFIELD, Individually and as Postmaster General of the United States,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The petitioners, appellants below, pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above-entitled cause on October 3, 1957.

Opinions Below

The opinions of the Court of Appeals for the District of Columbia Circuit (J.A. 141-150, 164-181) are not yet reported. They are reproduced in appendices I and II, *infra*, pp. 41-72. The opinion of the United States District Court for the District of Columbia (J.A. 117-134) is re-

ported at 128 F. Supp. 564 (1955). It is also reproduced in Appendix III, *infra*, pp. 73-94.

Jurisdiction

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on October 3, 1957 (J.A. 182). On October 18, 1957 that Court granted a stay of its mandate pursuant to Rule 31(k)(2) of its Rules pending an application to the United States Supreme Court for a writ of certiorari. The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1).

Questions Presented

1. Does a federal obscenity statute with criminal sanctions, 18 U. S. C. §1461, 62 Stat. 768, 69 Stat. 183, authorize the postmaster general to exercise censorial powers of prior restraint over periodical publications by withholding them from dispatch through the mails pending a determination of the issue of obscenity?

2. Did the hearing examiner of the Post Office Department and the District Court for the District of Columbia, whose judgment was affirmed by the Court of Appeals for the District of Columbia Circuit, in failing to consider the publications in the instant case as a whole apply a standard of obscenity in conflict with that which this Court prescribed in *Roth* v. *United States*, 354 U. S. 476 (1957)?

3. Did the District Court for the District of Columbia, whose judgment was affirmed by the Court of Appeals for the District of Columbia Circuit, in finding certain pictures to be obscene because they were "grotesque" and "vile"

apply a standard of obscenity in conflict with that which this Court prescribed in *Roth* v. *United States*, 354 U. S. 476 (1957)?

4. Did the Court of Appeals for the District of Columbia Circuit in judging the publications in this case rather than the conduct and intent of the petitioners decide a federal question in a way in conflict with this Court's decision in *Roth* v. *United States*, 354 U. S. 476 (1957)?

5. Did the purported hearing before the hearing examiner of the Post Office Department, in which all evidence was excluded save the challenged publications, comply with due process?

Constitutional and Statutory Provisions Involved

1. Fifth Amendment:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."

2. 18 U. S. C. §1461, 62 Stat. 768, 69 Stat. 183:

> **"Mailing obscene or crime-inciting matter**
>
> "Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance
>
> . . . . .
>
> "Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.
>
> "Whoever knowingly deposits for mailing or delivery, anything declared by this section to be nonmailable, or knowingly takes the same from the mails for the purpose of circulating or disposing thereof,

or of aiding in the circulation or disposition thereof, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

*** * * * * *"**

Statement of the Case

The petitioner, Sunshine Book Company, is a non-profit New Jersey corporation which publishes a monthly periodical, *Sunshine & Health*. This periodical advocates the cause of nudism and in the course of its advocacy has carried articles on this and a wide range of related social and educational questions by psychiatrists, psychologists, social workers, doctors and ministers (J.A. 21-22).

The petitioner, Solar Union Naturisme, Inc., is another non-profit New Jersey corporation. It publishes a bimonthly periodical, *Sun Magazine*, which is its official publication. This petitioner is an international, interlingual interracial association representing the nudist movement all over the world and on all levels of organization—individual, group, regional, national and international. *Sun Magazine* is the same type of periodical as *Sunshine & Health* except that its emphasis is on the international aspects of the nudist movement (J.A. 22-23).

Sunshine & Health and *Sun Magazine* have had and have a wide circulation locally, nationally and abroad. They have been and are being distributed to the 48 states through the United States mails. *Sunshine & Health* has now been published and distributed continuously for more than a quarter of a century. *Sun Magazine* is now in its sixth year of publication. At no time during this period of more than a quarter of a century have any of the publishers of these

two periodicals been indicted or otherwise criminally charged with or convicted for their publication, distribution or receipt through the United States mails under any of the federal criminal statutes governing the circulation, distribution, or receipt through the United States mails of obscene, lewd, lascivious or fraudulent matter (J.A. 24).

The managing editor of both periodicals is Dr. Ilsley Boone, and the editor of both is his daughter Mrs. Margaret A. B. Pulis (App. II, p. 65) (J.A. 49, 62, *Summerfield* v. *Sunshine Book Co.*, Oct. Term 1954, No. 665). Dr. Boone is a Baptist minister, a Master of Sacred Theology, and the dean of American nudists. He is a 78 year old great grandfather, whose children, grandchildren and great grandchildren are all nudists (J.A. 49, 56, *Summerfield* v. *Sunshine Book Co.*, Oct. Term 1954, No. 665).

Dr. Boone believes that human beings will be healthier physically and mentally if they practice nudism; that the practice of nudism will satisfy the healthy curiosity of children and eliminate the unhealthy curiosity of adults about the human body. He has visited most of the nudist camps in the United States and many of those in Europe. He has worked with and observed nudists by the thousands at work and at play for more than a quarter of a century. On the basis of his experience he states that the practice of nudism does not lead to sexual delinquency or lasciviousness in any form (*Id.* at 56-57).

Pictures illustrate the text of these two periodicals. These pictures were taken in nudist camps (*Id.* at 62). They show nudists in the enjoyment of thoroughly innocent activity. They contain nothing suggestive or pornographic. Some of them are not without artistic merit and

all of them present individuals in accordance with the conceptions of nudists as to the most harmonious relationship between human beings and the earth (J.A. 23-24).

Because of the pictures Dr. Boone has been in a series of long controversies with the Post Office Department, of which this is the third. The first proceeding involved the mailability of the May 1948 issue of *Sunshine & Health*, and began in April of that year. Subsequently this proceeding was enlarged to include the July, August, September and October 1948 issues. This proceeding continued from time to time before an examiner of the Post Office Department until it was dismissed on May 10, 1951, more than three years after its inception. The order dismissing this proceeding was entered at the request of the associate solicitor of the Post Office Department (J.A. 19).

In this and in a related proceeding petitioner, Sunshine Book Company, was permitted to offer testimony on community standards and on the effect of its publication upon readers. Its witnesses included Dr. J. G. N. Cushing, Dr. Ralph Banay, and Dr. Frederic Wertham, an eminent psychiatrist (J.A. 58).

In the discussions which led to the dismissal of the first proceeding on May 10, 1951, counsel for the petitioner, Sunshine Book Company, thought he had an understanding with the then Solicitor of the Post Office Department to the effect that, if there should be any future proceedings in the Post Office Department involving the mailability of issues of *Sunshine & Health* or similar publications, either of the parties could use the testimony of the experts who testified in the first proceeding (J.A. 58). In this proceeding the representatives of the Post Office Department denied that there was any such agreement (J.A. 54).

The second proceeding began in September 1952, when the then Solicitor for the Post Office Department, allegedly pursuant to 39 U. S. C. §259(a), 64 Stat. 451, sought to stop all mail addressed to the petitioners on the ground that the publications *Sunshine & Health* and *Sun Magazine* were obscene (J.A. 24-25). Petitioners filed answers to the complaint and a hearing was conducted before a hearing examiner of the Post Office Department in February 1953 (J.A. 25).

At the hearing petitioners stipulated to the introduction in evidence of 25 issues of *Sunshine & Health* from the March 1951 issue to and including the March 1953 issue, and seven issues of *Sun Magazine* beginning with the January-February 1952 issue and ending with the March-April 1953 issue (J.A. 25-26). Apart from the publications themselves, which were admitted in evidence by stipulation, the Post Office Department offered no evidence to support its complaint.

At that hearing the petitioners sought to produce expert testimony to the effect that the advocacy of nudism by text and illustration as in the challenged publications did not violate community standards and also as to the effect of these publications upon readers. The hearing examiner denied this offer of expert testimony (J.A. 14-15, 26).

In March 1953 the hearing examiner made his initial decision. He came to the conclusion that while the written materials in the challenged publications were not obscene, some of the photographs were objectionable within the meaning of 39 U. S. C. §259(a), 64 Stat. 451, and that accordingly the petitioners were in violation of that section as charged in the complaint. He recommended an order

by the Postmaster General for the denial to the petitioners of any mail communications or transmittals (J.A. 26-27).

Pursuant to the applicable rules and regulations of the Post Office Department for proceedings under 39 U. S. C. §259(a), 64 Stat. 451, the petitioners duly appealed from the determination by the hearing examiner to the Postmaster General. In June 1953 the Postmaster General by decision and orders concurred in the finding and recommendation of the hearing examiner (J.A. 27).

Thereupon the petitioners sought declaratory and injunctive relief in the United States District Court for the District of Columbia. After a full hearing federal District Judge Henry A. Schweinhaut found and held that the publications were not obscene, that they did not fall within 39 U. S. C. §259(a), 64 Stat. 451, and that the orders of the Postmaster General were invalid *Summerfield* v. *Sunshine Book Company*, D. D. C. Civ. Action No. 3007/53, July 13, 1953.

The Court of Appeals for the District of Columbia Circuit affirmed Judge Schweinhaut's decision on the ground that the Postmaster General's orders were "too broad". *Summerfield* v. *Sunshine Book Company*, 221 F. 2d 42, 48 (Dec. 16, 1954). In the course of its opinion the Court of Appeals described the publications as "nudist magazines which advocate and explain nudism and the nudist mode of living" (at 43), and stated that they had "a substantial and admittedly innocuous text". At 45. This Court denied certiorari. 349 U. S. 921 (May 9, 1955).

The decision of the Court of Appeals for the District of Columbia Circuit in the second proceeding was on December 16, 1954. The first issues of *Sunshine & Health* and

Sun Magazine following this decision were the February 1955 issue of *Sunshine & Health* and the January-February 1955 issue of *Sun Magazine*. The Postmaster General now sought to withhold these publications from dispatch through the mails under 18 U. S. C. §1461, 62 Stat. 768, 69 Stat. 183. Thus began this proceeding.

It began in the last week of December 1954. Just prior thereto the petitioner, Sunshine Book Co., had completed the printing of approximately 40,000 copies of the February 1955 issue of *Sunshine & Health*, of which 10,000 copies were to be circulated through the mails (App. I, p. 44). In that week the petitioner, Sunshine Book Company deposited 400 copies of this issue with the local postmaster at Mays Landing, New Jersey for mailing as third-class matter pursuant to 39 U. S. C. §235, 50 Stat. 119 (J.A. 31). On December 29, 1954 the local postmaster at Mays Landing, New Jersey sent to the Solicitor of the Post Office Department a copy of the February 1955 issue of *Sunshine & Health* from the 400 copies of that issue deposited with him (J.A. 41, 74). On the next day, December 30, 1954, the Solicitor instructed the local postmaster that:

> "... the February, 1955, issue, should be withheld from dispatch and the senders should be notified by registered mail of this action. They should be informed that they may have an opportunity to show cause within fifteen days why the article should not be disposed of as matter nonmailable under the provisions of 39 CFR 36.2, by offering through appearance at this office in person or by attorney, or through submission of a statement in writing, whatever evidence or arguments they care to submit." (J.A. 74)

In careful compliance with this instruction, the local postmaster under letter dated December 31, 1954, advised the publisher of *Sunshine & Health*:

> "I have been requested by the Solicitor of the Post Office Department to inform you that the February, 1955 issue of 'Sunshine and Health' is nonmailable and must be withheld from dispatch.
>
> "You may have an opportunity to show cause within fifteen days why the article should not be disposed of as matter nonmailable under the provisions of 39 CFR 36.2, by offering through appearance at the office of the Solicitor, Post Office Department, Washington, D. C. in person or by attorney, or through submission of a statement in writing, whatever evidence or arguments you care to submit. . . ." (J.A. 40, 75)

Promptly thereafter, and on Monday and Tuesday, January 3 and 4, 1955, the petitioner, Sunshine Book Company prepared its original complaint, motion for a temporary restraining order, and motion for a preliminary and permanent injunction (See J.A. 3, 8, 12). Prior to the filing of these papers and on Wednesday, January 5, 1955 Dr. Boone and his attorney had a conference with representatives of the Post Office Department in Washington in order to attempt to persuade them that the Postmaster General should recede from the position which he had taken with reference to the February 1955 issue of *Sunshine & Health*, at least until after the Post Office Department had made up its mind what to do about the decision of the Court of Appeals for the District of Columbia Circuit of December 16, 1955 in the second proceeding (J.A. 14). Representatives of the Post Office Department stated that they would give consideration to counsel's argument.

On Thursday, January 6, 1955, under the lure held out by representatives of the Post Office Department that they were still giving consideration to counsel's argument, Dr. Boone and his attorney again met with these representatives. At that time they asked counsel whether he wished a hearing on mailability of the February 1955 issue of *Sunshine & Health*. Counsel responded that he did not wish one of the Post Office Department's so-called hearings. A representative of the Post Office Department then stated that counsel was rejecting a hearing. Counsel again responded in the negative. He emphasized that he was neither rejecting nor requesting one of these so-called hearings. At this point the assistant solicitor for the Post Office Department served upon Dr. Boone and his attorney a notice of hearing for January 10, 1955 before a designated trial examiner (J.A. 14):

> ". . . to determine the mailability of the February 1955 issue of Sunshine and Health magazine, copies whereof are now being withheld from dispatch by the Postmaster at Mays Landing, New Jersey, pursuant to instructions issued to him by the Solicitor for the Post Office Department, copy attached. The postmaster's letter to you dated December 31, 1954, copy also attached, advises you of the availability of a hearing but erroneously states that the Solicitor had already made a determination of nonmailability with respect to the magazine, no ruling or determination either of mailability or nonmailability having yet been made by the Solicitor or by any person authorized to do so by or in behalf of the Post Office Department. The Chief Hearing Examiner's initial decision and recommendation will be subject to appeal to the Solicitor for the Post Office Department to whom the Postmaster General

has delegated the authority to make a final decision for the Department." (J.A. 16, 41, 73-74).

On the same date, January 6, 1955, the assistant solicitor served upon the petitioner, Solaire Union Naturisme, Inc., a notice of hearing to be held on January 11, 1955

> ". . . to determine the mailability of the January-February, 1955 issue of the publication entitled Solaire Universelle Nudisme Magazine, under the provisions of Title 18 United States Code, Section 1461.
>
> "Please also be advised that the undersigned will request a ruling by the Postmaster General or by the Solicitor pursuant to his duly delegated authority, declaring the aforesaid magazine to be obscene, lewd, lascivious and indecent and, therefore, nonmailable matter, which shall not be conveyed in the mails or delivered from any post office nor by any letter carrier under the provisions of said Title 18 United States Code, Section 1461." (J.A. 42)

On the same day, January 6, 1955, the petitioner, Sunshine Book Company, filed its complaint and motion (J.A. 2-13). On January 7, 1955 federal District Judge James R. Kirkland denied the requested temporary restraining order (J.A. 17, 105-106, 118), and set the hearing on petitioners' motion for a preliminary injunction for Monday, January 17, 1955.

There then began discussions between counsel for petitioners and representatives of the Post Office Department as to which should come first: the court hearing on the motion for a preliminary injunction or the purported hearing before the hearing examiner of the Post Office Department. These discussions were complicated by the fact that

January 15 and 16, 1955 were a Saturday and Sunday and counsel for petitioners, who resided in New York, wanted both the court hearing and the administrative hearing to take place during the course of a single week. He finally yielded priority of hearing to the representatives of the Post Office Department and agreed that the administrative hearing before the hearing examiner would be held on Monday, January 17, 1955 and the court hearing on petitioners' motion for preliminary injunction on Tuesday, January 18, 1955 (See J.A. 18, 43). This was the request by petitioners for additional time to which Circuit Judge Fahy referred in his concurring opinion of October 3, 1957 (App. I, p. 54).

On January 17, 1955 an administrative hearing took place before a hearing examiner of the Post Office Department on the question of the mailability of the February issue of *Sunshine & Health* and the January-February 1955 issue of *Sun Magazine* (J.A. 76). The hearing examiner stated near the outset that since the hearing involved mailability it was "governed by no published rules of practice or procedure that I am aware of" (J.A. 78). In this respect it was to be "distinguished from a proceeding under 39 U. S. C. §259(a) or a proceeding under the postal fraud of the statutes" (J.A. 78).

During the course of the hearing he stated "that this proceeding is being conducted without the benefit of any published rules of practice or procedure" (J.A. 80). He further twice stated, referring to the proceedings before him:

> "* * * this proceeding is not being conducted within the framework of the APA. * * *

> "* * * nor is it one of those cases in which our own rules of practice specifically brings it within the purvuew [sic] of an APA case wherein adjudication is required to be made upon the record after a hearing." (J.A. 82)

At that proceeding the Post Office Department offered no evidence other than the challenged issues of the magazines. Petitioners urged that the publications were not obscene, that the issue of obscenity had already once been determined and that the action to bar the publications from the mails was in excess of statutory and constitutional authority.

Petitioners further offered evidence concerning community standards and on the effect on readers of the publications in question. Petitioners offered portions of the testimony of Dr. Ralph Banay, Dr. J. E. N. Cushing and Dr. Frederic Wertham from the first proceeding (J.A. 93-94). The hearing examiner sustained an objection (J.A. 95). Petitioners offered the uncontested affidavits of Dr. Boone, his daughter, Margaret A. B. Pulis, Dr. Albert Ellis, a psychologist, Mr. Eugene V. Thau, an art historian, and the Reverend Charles Francis Potter from the second proceeding (J.A. 83) (J.A. 41-66, *Summerfield* v. *Sunshine Book Company*, Oct. 1957, No. 665). The hearing examiner rejected them (J.A. 95-96).

On January 18, 1955 the petitioners filed their amended complaint, which was substantially the same as the original complaint except that it included the matters of fact and law which arose as a consequence of the barring from the mails of the January-February 1955 issue of *Sun Magazine*. On the same day Judge Kirkland heard argu-

ment on petitioners' motion for a preliminary injunction. He denied it and set the cause down for trial for January 31, 1955 (J.A. 43).

On January 20, 1955 the hearing examiner filed his decision and recommendation (J.A. 61). He found the issues in question to be obscene and recommended that they be declared nonmailable (J.A. 69). At the same time he notified the petitioners that an appeal to the Solicitor was available to them but that it had to be filed not later than January 25, 1955 (J.A. 60). The petitioners filed their notice of appeal on January 24, 1955 (J.A. 55). At the same time they made a motion for leave to submit evidence on community standards (J.A. 57-59). The attorney for the Post Office Department opposed this motion (J.A. 53). The only response to this motion was the concurrence of the Solicitor in the decision and recommendation of the hearing examiner and his instruction to the local postmaster at Mays Landing, New Jersey to treat the February 1955 issue of *Sunshine & Health* and the January-February issue of *Sun Magazine* as nonmailable (J.A. 44-45). The Solicitor's ruling reached counsel for petitioners at 10:00 P.M. Sunday evening, January 30, 1955 (J.A. 100, 110).

On the next day, January 31, 1955, the court case came on for hearing before Judge Kirkland (J.A. 97). Near the outset Judge Kirkland declared that he had been over the reading material in the publications in question "carefully" and had found nothing in the text that was obscene (J.A. 108). Petitioners again offered expert testimony on community standards and on the effect of petitioners' periodicals upon readers. Judge Kirkland ruled that such evidence was not relevant (J.A. 108-115).

At the conclusion of the hearing and on the same day Judge Kirkland announced his decision from the bench, ruling against petitioners (J.A. 117-135). Although he concluded that the whole of the text was unobjectionable (128 F. Supp. at 569, J.A. 126, App. III, p. 84), he found five photographs in each of the publications to be obscene (128 F. Supp. at 571-573, J.A. 129-133, App. III, pp. 88-92). The space which the proscribed photographs occupy is approximately 3% of the issue of *Sunshine & Health* and 2% of the issue of *Sun Magazine*.

As to two of the five proscribed photographs in the issue of *Sunshine & Health* the Court found them to be obscene because they were "grotesque" and "vile", and one because it was "filthy" (128 F. Supp. at 571-572, J.A. 130-131, App. III, 88-90). One of the proscribed pictures in *Sun Magazine* the Court found to be obscene because of its "vulgarity" (128 F. Supp. at 572, J.A. 132, App. III, p. 91). On the basis of these five photographs in each of the two issues in question Judge Kirkland concluded that the dominant theme of both magazines was "clearly one of obscenity" (128 F. Supp. at 573, J.A. 134, App. III, p. 93).

On February 16, 1955 Judge Kirkland filed findings of fact and conclusions of law and entered a judgment dismissing the amended complaint with prejudice (J.A. 135-139). One of his findings of fact was that the text of the magazines was not obscene (J.A. 137).

On May 31, 1956 the Court of Appeals for the District of Columbia Circuit handed down a 2-1 decision reversing the judgment of the district court on the ground that the Postmaster General's action constituted a prior restraint

not warranted by 18 U. S. C. §1461, 62 Stat. 768, 69 Stat. 183. Circuit Judge Washington wrote the opinion of the court in which Chief Judge Edgerton concurred. Circuit Judge Danaher dissented (App. II, pp. 68-72).

The respondent requested a rehearing *en banc* which the court ordered (J.A. 167, App. I, p. 44). The rehearing took place on September 25, 1956. On October 3, 1957 the court rendered a 5-3 decision affirming the judgment of the District Court. Circuit Judge Danaher wrote the majority opinion and Circuit Judge Washington the dissenting one (J.A. 164-181, App. I, pp. 41-60). The court's judgment was entered on the same day (J.A. 182, App. I, p. 61). On October 18, 1957 the court granted a stay of its mandate pending an application to this Court for a writ of certiorari.

The opinion of May 31, 1956 of the Court of Appeals for the District of Columbia Circuit contained this paragraph:

> "In the instant case, the magazines 'advocate and explain nudism and the nudist mode of living.' *Summerfield* v. *Sunshine Book Co.*, 95 U. S. App. D. C. at 170, 221 F. 2d at 43. Their texts were found by the Post Office Department and the District Court not to be obscene. But both the Department and the District Court thereupon proceeded to deal with the illustrations in the magazines merely as such. The Examiner of the Post Office Department and the District Court explicitly recognize in their opinions that the publications must be considered as a whole. Yet an examination of their opinions, as well as that of the Solicitor of the Post Office Department, shows no

effort to weigh the material considered objectionable against the rest of the contents, or to weigh the risk in permitting the former to circulate against the limitations on freedom of the press implicit in halting circulation of the latter. Furthermore, neither the Department nor the District Court appears to have investigated or considered the intent of the publisher, one of the important elements in obscenity cases. *Parmelee* v. *United States, supra,* 72 App. D. C. at 209, 113 F. 2d at 735; *United States* v. *One Book Entitled Ulysses, supra,* 72 F. 2d at 707, 708. 'Honest, sincere' works must be distinguished from publications 'wholly for the purpose of profitably pandering to the lewd and lascivious.' *Parmelee* v. *United States, supra,* 72 App. D. C. at 209, 210, 113 F. 2d. at 735, 736. If the matter of intent had been considered, substantial evidence of sincerity of motive, and lack of 'profitable pandering' was contained in uncontroverted affidavits by the managing editor of the magazines in question, who is an ordained Baptist minister, and by the editor of the magazines, his daughter." (J.A. 143-144, App. II, pp. 64-65).

Approximately 25% of the total circulation of *Sunshine & Health* and 30% of the total circulation of *Sun Magazine* was to be distributed through the mails (J.A. 167, App. I, p. 44, J.A. 30, 33). In this connection petitioners alleged in their amended complaint:

> "Thirty-fifth: In the United States today the life of dated periodical publications depends on their prompt dissemination through the United States mails and the Post Office Department has long recognized the importance of the use of the mails for the prompt circulation of periodical publications.
>
> "Thirty-sixth: In the United States today the life of periodical publications depends on their prompt

circulation through the United States mails, and for two reasons: In the first place the dissemination through the United States mails must be prompt, for any delay in distribution of a dated periodical publication means the death of this issue; in the second place periodical publications depend for their continued existence on dissemination through the United States mails for they receive a larger percentage of return on copies so disseminated to subscribers than on the copies distributed by other means such as those distributed by means of newsstands." (J.A. 33-34)

Reasons for Granting the Writ

I

The Court of Appeals for the District of Columbia Circuit, in holding that a federal obscenity statute with criminal sanctions, 18 U. S. C. §1461, 62 Stat. 768, 69 Stat. 183, authorized the Postmaster General to exercise censorial powers of prior restraint over periodical publications by withholding them from dispatch through the mails pending a determination of obscenity, decided an important question of federal law which has not been, but should be, settled by this Court.

A.

In *Roth* v. *United States*, 354 U. S. 476 (1957) The Court Did Not Reach The Question Whether 18 U. S. C. §1461, 62 Stat. 768, 69 Stat. 183, was more Than A Penal Statute.

In *Roth* v. *United States*, 354 U.S. 476 (1957), the Court sustained the constitutionality of 18 U. S. C. §1461, 62 Stat. 768, 69 Stat. 183, in a criminal prosecution. However, the Court did not reach the question whether this statute was more than penal in nature. It did not reach

the question whether this statute also conferred upon the Postmaster General censorial powers of prior restraint over periodical publications by withholding them from dispatch through the mails pending a determination of the issue of obscenity. That question is presented in this case. It is an important question of federal law. It has not been but should be settled by this Court.

The differences in procedure between a criminal prosecution and an administrative hearing are vital. In a criminal proceeding one is entitled as of right to a jury trial. In an administrative hearing there is no jury. If one is constitutionally entitled to a jury trial on the issue of obscenity, then 18 U. S. C. §1461, 62 Stat. 768, 69 Stat. 183, cannot be construed as other or more than a criminal statute. In the *Roth* case the Court did not reach this question. As Mr. Justice Brennan, who wrote the Court's opinion, pointed out in his dissenting opinion in *Kingsley Books* v. *Brown*, 354 U. S. 436 (1957), the instant obscenity statute as applied in the *Roth* case "allowed a jury trial of right, and we did not reach the question whether the safeguards necessary for securing the freedoms of speech and press for material not obscene included a jury determination of obscenity." 354 U. S. at 448. That important question is presented here. It should be settled by this Court.

B.

The Instant Federal Obscenity Statute, 18 U. S. C. §1461, 62 Stat. 768, 69 Stat. 183, Always Has Been And Still Is Nothing Other Or More Than A Criminal Statute.

The instant federal obscenity statute began as a criminal statute and it is still one. It was part of the Criminal

Code of 1909. 35 Stat. 1129. It is part of the Criminal Code today.

The first predecessor of 18 U. S. C. §1461, 61 Stat. 768, 69 Stat. 183, was §16 of an Act of March 3, 1865. 13 Stat. 507. This section provided:

> ". . . no obscene book, pamphlet, picture, print, or other publication of a vulgar and indecent character, shall be admitted into the mails of the United States; any person or persons who shall deposit or cause to be deposited, in any post-office or branch post-office of the United States, for mailing or for delivering, an obscene book, pamphlet, picture, print, or other publication, knowing the same to be of a vulgar and indecent character, shall be deemed guilty of a misdemeanor, and, being duly convicted thereof, shall for every such offence be fined, not more than five hundred dollars, or imprisoned not more than one year, or both, according to the circumstances and aggravations of the offence."

The Senate debates on this measure make it plain that it was intended to be only a criminal statute. As reported in the Senate the measure originally contained this additional provision:

> ". . . all such obscene publications deposited in or received at any post office, or discovered in the mails, shall be seized and destroyed, or otherwise disposed of, as the Postmaster General shall direct." *Cong. Globe*, 38 Cong., 2d Sess. 661 (1865).

Senator Jacob Collamer of Vermont in reporting the proposed measure had misgivings about this clause because it would give the Postmaster General "a sort of censorship over the mails." *Ibid.* Senator Reverdy Johnson of

Maryland moved to strike it on the ground "that it would be establishing a very bad precedent to give authority to postmasters to take anything out of the mail." *Ibid.* The Clause was stricken.

There is nothing to show that in any of the subsequent revisions of this measure Congress intended to give the Postmaster General the censorial powers specifically denied to him in 1865.

On the contrary in 1915 a bill was introduced, 63d Cong., 3d Sess., H.R. 20,644, to give the Postmaster General power to deny the use of the mails to one who in the opinion of the Postmaster General was engaged in the publication of obscene material. It was objected that this "bill would invest one man * * * with the power to destroy the business of a publisher without affording any opportunity for trial by jury, according to regular Court practice. * * * Trial by jury and a penalty inflicted for each specified act is the only safeguard against an arbitrary and tyrannical power." *Hearings Before House Committee On The Postoffice and Postroads, Exclusion Of Certain Publications From The Mails,* 63d Cong., 3d Sess. 38-39 (February 1, 1915). The bill failed of passage. Justice Brandeis related this incident in his dissenting opinion in *United States ex rel. Milwaukee Social Democratic Pub. Co.* v. *Burleson,* 255 U. S. 407, 424 n. 7 (1921):

What this Court said of one of the predecessors of 18 U. S. C. §1461, 62 Stat. 768, 69 Stat. 183, in *Ex parte Jackson,* 96 U. S. 727 (1878), still holds true today. In that case this Court said:

> "All that Congress meant by this Act was, that the mail should not be used to transport such corrupt-

ing publications and articles, and that anyone who attempted to use it for that purpose should be punished." At 736.

That statement is still valid about the present obscenity statute.

But the Court of Appeals for the District of Columbia Circuit in its opinion of October 3, 1957, pointed to the declaration of nonmailability (J.A. 169-170, App. I, p. 47). This declaration and the further provision that obscene material was not to be "delivered from any post-office nor by any letter-carrier" was first added to this obscenity measure by an Act of July 12, 1876, 19 Stat. 90; and there was no discussion on the point. It is to be doubted whether Congress intended by these additions to give the Postmaster General powers of prior restraint specifically denied to him scarcely more than a decade before. It may be suggested that the exclusionary words introduced into this obscenity measure by the Act of 1876 were only intended to authorize the Post Office Department to refuse delivery of publications previously found to be obscene as a result of a criminal proceeding in which there was a right to a jury trial. Such a construction of this obscenity measure would entail no system of administrative prior restraint, for obscenity judgments would rest exclusively with juries summoned in criminal proceedings and the Post Office Department would merely carry these prior jury judgments over into its administration of the postal service.

By way of contrast to 18 U. S. C. §1461, 62 Stat. 768, 69 Stat. 183, one can refer to 18 U. S. C. §1463, 62 Stat. 769, with reference to obscene matter on wrappers or envelopes, which contains the added provision that such materials "shall be withdrawn from the mails under such

regulations as the Postmaster General shall prescribe." There is no such or comparable provision in the instant statute.

C.

Censorial Powers Of Prior Restraint Should Be Denied In The Absence Of An Express Congressional Grant.

In *Hannegan* v. *Esquire*, 327 U. S. 146 (1946), this Court pointed out that Congress had always "zealously watched and strictly confined" any proposal to empower the Postmaster General to refuse to carry mail because of its content. At 156 n. 18. This Court has taken the same approach, as *Hannegan* v. *Esquire, supra*, and other cases demonstrate. In *Hannegan* v. *Esquire, supra*, the Court held that the Postmaster General did not have power to deprive *Esquire* Magazine of second-class mailing rates because he doubted the worth of the magazine's contents. The Court said:

> ". . . To uphold the order of revocation would, therefore, grant the Postmaster General a power of censorship. Such a power is so abhorrent to our traditions that a purpose to grant it should not be easily inferred." At 151.

In *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94 (1902), the Court gave a restrictive construction of the mail fraud statute in order to preclude the Postmaster General from exercising power over the use of the mails upon the basis of matters of opinion, saying:

> ". . . Unless the question may be reduced to one of of fact, as distinguished from mere opinion, we think these statutes cannot be invoked for the purpose of stopping the delivery of mail matter." At 106.

In *Reilly* v. *Pinkus*, 338 U. S. 269 (1949) the Court in refusing to enforce a fraud order of the Postmaster General with reference to a weight reducing plan said:

> "... It would amount to condemnation of new ideas without a trial to give the Postmaster General power to condemn new ideas as fraudulent solely because some cling to traditional opinions with unquestioning tenacity." At 274.

See also *Donaldson* v. *Read Magazine*, 333 U. S. 178, 181-183 (1948); *Leach* v. *Carlile*, 258 U. S. 138, 140-141 (1922) (dissenting opinion of Justice Holmes in which Justice Brandeis concurred); *United States ex rel. Milwaukee Social Democratic Pub. Co.* v. *Burleson*, 255 U. S. 407, 417, 430-432 (1921) (dissenting opinions of Justices Brandeis and Holmes) ("... and it would take very strong language to convince me that Congress ever intended to give such a practically despotic power to any one man ...", at 437, Justice Holmes); *Stanard* v. *Olesen*, 74 S. Ct. 768, 770-771 (1954) (opinion of Mr. Justice Douglas); *cf. United States* v. *Ballard*, 322 U. S. 78 (1944).

This restrictive approach to censorial powers of prior restraint requires that the instant obscenity statute, 18 U. S. C. §1461, 62 Stat. 768, 69 Stat. 183, be held to be only a criminal statute and nothing more. As the Court of Appeals for the District of Columbia Circuit stated in its opinion of May 31, 1956 and the dissent stated in its opinion of October 3, 1957, quoting with approval from that court's opinion in the second proceeding:

> "... The Authority under which the Department is said to be operating in this field is a criminal statute passed in 1873: it contains no language which directs the Department to refuse to transport

and deliver newspapers and magazines pending final decision on its part as to whether their content is acceptable to it. 'Some day Congress may perhaps give that authorization in specific terms, with proper guidance for and restrictions on administrative action, and with such safeguards as the Constitution may require. But Congress has not done so here.' *Summerfield* v. *Sunshine Book Co.*, 95 U. S. App. D. C. 169 at 175, 221 F. 2d 42 at 48 (1954)." (J.A. 146, 176, App. I, p. 55, App. II, pp. 67-68).

D.

Authority In The Postmaster General To Exercise Prior Restraint Would give Him The Power Of Life And Death Over Periodical Publications.

In this country today periodical publications depend for their existence upon their prompt circulation by means of the United States mails. This is so for two reasons: in the first place, any delay in the distribution of a dated periodical means the death of that issue; in the second place, periodicals depend for their continued existence on dissemination through the mails because they receive a larger percentage of return on copies so distributed to subscribers than on copies disseminated by other means. (J.A. 34). As Justice Brandeis said in another connection in his dissenting opinion in *United States Ex rel Milwaukee Social Democratic Pub. Co.* v. *Burleson*, 255 U. S. 407 (1921), with reference to a revocation by the Postmaster General of second-class mail rates:

> "If such power were possessed by the Postmaster General, he would, in view of the practical finality of his decisions, become the universal censor of publications. For a denial of the use of the mail would be, for most of them, tantamount to a denial of the right of circulation. * * *" At 423.

Or as the Court of Appeals for the District of Columbia Circuit observed in *Pike* v. *Walker*, 121 F. 2d 37, *cert. denied* 314 U. S. 625 (1941):

> "Whatever may have been the voluntary nature of the postal system in the period of its establishment, it is now the main artery through which the business, social, and personal affairs of the people are conducted and upon which depends in a greater degree than upon any other activity of government the promotion of the general welfare * * *." At 39.

See also *Reilly* v. *Pinkus*, 338 U. S. 269 (1949) where with reference to a fraud order of the Postmaster General this Court observed:

> ". . . Unlike the Postmaster General, the FTC cannot bar an offender from using the mails, an order which could wholly destroy a business." * * *" At 277.

Nor is it any answer to say as the Court of Appeals for the District of Columbia Circuit does in its opinion of October 3, 1957 or as Circuit Judge Fahy does in his concurring opinion that the Post Office Department moved "expeditiously." (J.A. 173, 175, App. I, pp. 51-52, 54). The questions involved in such proceedings are never resolved expeditiously and any monthly periodicals which are involved in them will become obsolete long before those proceedings are at an end. It is not necessary to go beyond the monthly periodical, *Sunshine & Health*. The first proceeding against this periodical lasted more than three years, from April 1948 to May 1951 (J.A. 19.) The second proceeding lasted most of three years, from September 1952 to May 1955. The third proceeding, which began in December 1954, is nearing the end of its third year. It

certainly requires no more than a statement of these facts to demonstrate that a monthly magazine, which depends for its continued existence on its prompt circulation through the mails, would soon come to an end if the Postmaster General proceeded month after month against it as he has proceeded in the instant case against *Sunshine & Health*. A monthly periodical is obsolete if its circulation is delayed as much as two or three weeks, let alone two or three years.

Likewise it is no answer to say, as does the Court of Appeals for the District of Columbia Circuit in its opinion of October 3, 1957, that from 70% to 75% of petitioners' periodicals *Sunshine & Health* and *Sun Magazine* are distributed otherwise than through the mails. (J.A. 167, 173, App. I, pp. 44, 52). It is the 25% to 30% margin distributed by means of the mails that spells the difference between survival and suspension in the competition of the market in the United States today: on the copies distributed through the mails there is a larger percentage of return. (J.A. 34).[1]

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[1] It is probably no longer necessary at this date to meet the old contention that the use of the mails is a privilege which Congress can regulate at will. As Mr. Justice Harlan observed in a footnote in his dissenting opinion in *Roth* v. *United States*, 354 U. S. 476, (1957): "The hoary dogma of *Ex parte Jackson*, 96 U. S. 727, and *Public Clearing House* v. *Coyne*, 194 U. S. 497, that the use of the mails is a privilege on which the Government may impose such conditions as it chooses, has long since evaporated. See Brandeis, J., in *Milwaukee Social Democratic Publishing Co.* v. *Burleson*, 255 U. S. 407, 430-433; Holmes, J., in *Leach* v. *Carlile*, 258 U. S. 138, 140; *Cates* v. *Haderline*, 342 U. S. 804, *reversing* 189 F. 2d 369; *Door* v. *Donaldson*, 195 F. 2d 764." At 504 n. 5.

II

The hearing examiner of the Post Office Department, the District Court for the District of Columbia, and the Court of Appeals for the District of Columbia Circuit applied standards of obscenity in conflict with that which this Court prescribed in *Roth* v. *United States*, 354 U. S. 476 (1957).

A.

The Hearing Examiner Of The Post Office Department And The Federal District Court, Whose Judgment Was Affirmed By The Court of Appeals For The District Of Columbia Circuit, Failed To Consider The Publications In The Instant Case As A Whole.

The test for obscenity as laid down in *Roth* v. *United States*, 354 U. S. 476 (1957) is this:

> "* * * whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." At 489.

Although the hearing examiner for the Post Office Department and the federal district judge both stated that in determining obscenity, publications had to be considered as a whole, they nevertheless proceeded to make their determinations on the basis of a few pictures. Although admitting that the text in the instant publications was not obscene, they promptly proceeded to ignore this fact in arriving at their conclusion. As the Court of Appeals for the District of Columbia Circuit pointed out in its opinion of May 31, 1956 and as the dissent pointed out in its opinion of October 3, 1957:

> "* * * The Examiner of the Post Office Department and the District Court explicitly recognize in their

> opinions that the publications must be considered a
> a whole. Yet an examination of their opinions, a
> well as that of the Solicitor of the Post Office De
> partment, shows no effort to weigh the material con
> sidered objectionable against the rest of the con
> tents, or to weigh the risk in permitting the forme
> to circulate against the limitations on freedom o
> the press implicit in halting circulation of th
> latter." (J.A. 143, 179, App. I, p. 58, App. II, p. 65)

District Judge Kirkland based his finding of obscenit
on but five photographs in each of the publications in th
instant case (128 F. Supp. at 571-573, J.A. 129-133, App
III, pp. 88-92). These proscribed photographs occupied bu
3% of the space in the questioned issue of *Sunshine &*
Health and but 2% of the space in the questioned issue o
Sun Magazine.

B.

The Federal District Court, Whose Judgment Was Affirmed By The Court of Appeals For The District Of Columbia Circuit, In Finding Certain Pictures To Be Obscene Because They Were "Grotesque" and "Vile" Applied A Standard Of Obscenity In Conflict With That Which This Court Proscribed in *Roth* v. *United States*, 354 U. S. 476 (1957).

Moreover as to two of the five proscribed photographs i
the questioned issue of *Sunshine & Health* District Judg
Kirkland found them to be obscene because they were
"grotesque" and "vile", and one because it was "filthy"
(128 F. Supp. at 571-572, J.A. 130-131, App. III, pp. 88-90)
One of the proscribed pictures in *Sun Magazine* the judg
found to be obscene because of its "vulgarity" (128 F
Supp. at 572, J.A. 132, App. III, p. 93).

But under *Roth v. United States*, 354 U. S. 476 (1957)
only that in obscene "which deals with sex in a manner ap

pealing to prurient interest." At 487. In a footnote the Court further defined such material as that "having a tendency to excite lustful thoughts." At 487 n. 20. District Judge Kirkland did not even apply the proper standard of obscenity to some of the few pictures he found to be obscene. As the dissent in the court below pointed out in its opinion of October 3, 1957:

> "It is also questionable whether finding a picture 'grotesque' sufficiently complies with the Supreme Court's mandate requiring a finding of appeal to 'prurient interest.'" (J.A. 179-180, n. 7, App. I, p. 58, n. 7).

C.

The Court of Appeals For The District Of Columbia Circuit, In Judging The Publications In The Instant Case Rather Than The Conduct And Intent Of The Petitioners, Decided A Federal Question In A Way In Conflict With This Court's Decision In *Roth* v. *United States*, 354 U. S. 476 (1957).

As the dissent stated in its opinion of October 3, 1957:

> "In the instant case, the magazines 'advocate and explain nudism and the nudist mode of living.' *Summerfield* v. *Sunshine Book Co.*, 95 U. S. App. D. C. at 170, 221 F. 2d. at 43. One of the magazines has been published for over twenty yars. Their texts were found by the Post Office Department and the District Court not to be obscene." (J.A. 179, App. I, p. 58).

In addition as the court below pointed out in its opinion of May 31, 1956:

> ". . . Furthermore, neither the Department nor the District Court appears to have investigated or considered the intent of the publisher, one of the important elements in obscenity cases. *Parmelee* v. *United States*, *supra*. 72 App. D. C. at 209, 113 F.

2d at 735; *United States* v. *One Book Entitled Ulysses, supra*, 72 F. 2d at 707, 708. 'Honest, sincere works must be distinguished from publications 'wholly for the purpose of profitably pandering to the lewd and lascivious.' *Parmelee* v. *United States, supra*, 72 App. D. C. at 209, 210, 113 F. 2d at 735, 736. If the matter of intent had been considered, substantial evidence of sincerity of motive, and lack of 'profitable pandering,' was contained in uncontroverted affidavits by the managing editor of the magazines in question, who is an ordained Baptist minister, and by the editor of the magazines, his daughter." (J.A. 143-144, App. II, p. 65).

Moreover, the pictures in the publications in the instant case were taken in nudist camps and were put in these publications for the purpose of illustrating the text and advancing the cause of nudism (J.A. 62, *Summerfield* v. *Sunshine Book Co.*, Oct. Term 1954, No. 665). Nudists feel that in order to present their ideas intelligently and effectively they need pictures to illustrate the text and show the healthy enjoyment that people derive from being out of doors in the nude. In the present state of development of the graphic arts, and in these days of pictorial newspapers, magazines and books, the force of this argument should readily be conceded. Indeed, in *Parmelee* v. *United States*, 113 F. 2d 729 (D. C. Cir. 1940), the court quoted with approval this portion of the preface of Parmelee's book *Nudism in Modern Life*:

> "The illustrations depict better than words can describe the natural and normal life, and the beautiful and healthful methods and activities of a gymnosophic society. They portray them as actually applied in several European countries by many thousands of men, women and children of all classes,

> occupations and conditions, while the text discusses its scientific, hygienic, cultural, aesthetic, ethical and humanitarian significance." At 737.

Had the Court of Appeals for the District of Columbia Circuit taken into account the conduct and intent of Dr. Boone and his associates, their belief in nudism and their desire to advance it, their distribution of the publications in question in order to gain new converts to nudism, the absence of a dominating profit motive and the use the pictures in these publications to make more effective the presentation of the ideas of nudism, the scales should have been tipped in favor of the legality of these publications.

As Mr. Chief Justice Warren pointed out in his concurring opinion in *Roth* v. *United States*, 354 U. S. 476 (1957), the conduct and intent of the petitioners have an important relevance. Mr. Chief Justice Warren stated:

> "• • • It is not the book that is on trial; it is a person. The conduct of the defendant is the central issue, not the obscenity of a book or picture. The nature of the materials is, of course, relevant as an attribute of the defendant's conduct, but the materials are thus placed in context from which they draw color and character. A wholly different result might be reached in a different setting." At 495.

Or as Mr. Chief Justice Warren observed in his dissenting opinion in *Kingsley Books* v. *Brown*, 354 U. S. 436 (1957), a civil proceeding:

> "• • • this New York law places the book on trial. There is totally lacking any standard in the statute for judging the book in context. The personal element basic to the criminal laws is entirely absent. In my judgment, the same object may have wholly

different impact depending upon the setting in which it is placed. Under this statute, the setting is irrelevant.

"It is the manner of use that should determine obscenity. It is the conduct of the individual that should be judged, not the quality of art or literature * * *." At 445-446.

Years ago in *United States* v. *Kennerley*, 209 Fed. 119 (D. S. D. N. Y. 1913), Judge Learned Hand remarked:

"I question whether in the end men will regard that as obscene which is honestly relevant to the adequate expression of innocent ideas, and whether they will not believe that truth and beauty are too precious to society at large to be mutilated in the interests of those most likely to pervert them to base uses." At 120-121.

The advocacy of nudism is as old as Plato, with modern adherents throughout the world. See *e.g.* Plato, *The Republic*, bk. 5, pp. 140-147 (B. Jowett transl., rev. ed. 1901); France, *Penguin Island*, bk. 2, c. 1 (A. W. Evans transl.); 1 Montaigne, *Essays*, c. 36, pp. 198-201 (Zeitlin transl. 1934); Parmelee, *Nudism In Modern Life*, 219-228 (5th ed. 1952). Surely the First Amendment protects such advocacy, as well as any means which are reasonably and fairly relevant to it. This includes pictures.

But even if Judge Kirkland was right in finding a few of the pictures to be obscene, still we submit that any public interest served by barring from the mails and from the people of the United States petitioners' ideas is infinitesimal when compared with the loss suffered by prospective readers of the magazines and of the writings of

others as well as petitioners. We of course understand that the world will not come to an end if subscribers to the challenged periodicals in the instant case will not receive them through the mails. Nevertheless, if the Postmaster General has the powers of censorship which he claims here, then he can keep from the American people such works of literature, art, science and persuasion as may run afoul of the notions of obscenity of one or more of a few postoffice officials in Washington.

We submit that if one will take into account the conduct and intent of Dr. Boone and his associates, their interest in promoting the cause of nudism, their circulation of the periodicals *Sunshine & Health* and *Sun Magazine* to this end, and judge the challenged issues as a whole in the light of these facts, one should come to the conclusion that so judged they are not obscene.

III

The purported administrative hearing in the Post Office Department, in which all evidence was excluded save the challenged publications, violated due process.

The Post Office Department wants to treat the issue of obscenity on a *sui generis* basis. It wants no hearings, and if there are any, it does not want them under the aegis of the Administrative Procedure Act. It wants no evidence: it does not want to hear the testimony of experts or anyone else on community standards or on the effect of the publications in question on readers. All the Post Office Department wants is to have some officials in Washington look at the questioned publications and decide for the whole

country whether they are safe for the people to read or see. See *Attorney General's Committee On Administrative Procedure, The Post Office Department* 95-98 (1940).

In line with this approach the Postmaster General in the instant case provided an *ad hoc* hearing procedure. At the resultant gathering, the hearing examiner twice stated that the proceeding was not being conducted within the framework of the Administrative Procedure Act (J.A. 82). He twice stated that the proceeding was being conducted without the benefit of any published rules of practice or procedure (J.A. 78, 80). And no such published rules or regulations in fact existed. In this respect the procedure violated §3(a)(2) of the Administrative Procedure Act. 5 U. S. C. §1002(a)(2), 60 Stat. 238. Promptly after the purported hearing the hearing examiner made his findings; with equal promptness, after an appeal without hearing or argument, those findings were affirmed. The final result confirmed the statement of the local postmaster, preceding the "hearing", that the Solicitor had already determined that the publications were nonmailable (J.A. 40, 75). Except for a notice and a gathering of the parties this purported hearing was not a hearing in anything but name.

Moreover, petitioners repeated offers of expert testimony on community standards and on the effect of petitioners' publications on readers were uniformly rejected.[2] But under *Roth* v. *United States*, 354 U.S. 476 (1957) the standard of obscenity is this:

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[2] "[To some judges] the obscene is self-evident, and they neither need nor want the help of evidence concerning a book's value in these respects. Fortunately, few judges are afflicted with this form of bigotry and obtuseness." Lockhart and McClure, *Literature, the Law of Obscenity, and the Constitution*, 38 Minn. L. Rev. 295, 348 (1954).

> ". . . whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." At 489.

Surely under this test evidence of contemporary community standards is relevant and material. The Post Office Department will have none of it. Again surely under this standard of obscenity, evidence of the effect of questioned publications upon readers is relevant and material. But again the Post Office will have none of it.

The arbitrary and unpredictable results of such an unconstitutional procedure may readily be gathered from some testimony which Mr. Roy C. Frank, a former Solicitor of the Post Office Department, gave before the House Select Committee on Current Pornographic Materials (the Gathings Committee) as to how the department arrived at its determination of obscenity:

> "Mr. Frank: * * * I may say, however, that Mr. Mindel hasn't the final say on it. For example, if he writes an opinion, it goes to the Assistant Solicitor, who looks it over, and if he disagrees, the two will argue it out.
>
> "If the Assistant Solicitor agrees, it goes to Mr. Doyle, the Associate Solicitor, who is authorized to sign my name to it, if he agrees.
>
> "If he disagrees, he brings it in to me, and we will discuss it, and I may say, along the lines of what the captain testified to, that sometimes you can get five people together, and you can give them five pieces of mail, and ask them to mark them, and you will get five different results, because in some cases it is just one of those things that depends on your own personal ideas and your own bringing-up; it de-

pends upon how strongly you feel about things, and there are some types of that material that you just can't get two people to agree on no matter how reasonably and how objectively they look upon it. It is just an honest difference of opinion. We experience it all the time, so we have our conferences, and we decide what is going to be the best thing to do."

Counsel for the Gathings Committee tried to help out Mr. Frank:

> "Mr. Burton: Those cases are frequently called your border-line cases, are they not?"

But Mr. Frank was not to be helped:

> "Mr. Frank: Border-line cases, that is right; and may I say there are many of them, Mr. Counsel." *Report of the Select Committe On Current Pornographic Materials,* H. R. Rep. No. 2510, 82d Cong., 2d Sess. 94-95 (1952).

The consequences of such a procedure should give one great pause. Especially should they do so when one reflects that in the recent past alone, since 1940, the Post Office Department has stopped mailings of the following books, among many others: James Jones, *From Here to Eternity;* Alberto Moravia, *The Woman of Rome;* Ernest Hemingway, *For Whom the Bell Tolls;* Lillian Smith, *Strange Fruit*; John O'Hara, *Appointment in Samarra*; Emile Augiers, *Diana*; *Memoirs of Casanova*; Erskine Caldwell, *Tobacco Road*, and *God's Little Acre*; Simone de Beauvoir, *The Second Sex;* Aristophanes, *Lysistrata;* and Guy de Maupassant, *Mademoiselle Fifi.* What it has done and sought to do to periodicals is even worse.

One can add a further disturbing factor: decisions made by such a group of federal officials in Washington will be

applicable to the whole country. The words of Mr. Justice Harlan in his dissenting opinion in *Roth* v. *United States*, 354 U. S. 476 (1957), become poignantly appropriate:

> "* * * But the dangers to free thought and expression are truly great if the Federal Government imposes a blanket ban over the Nation * * *. The prerogative of the States to differ on their ideas of morality will be destroyed, the ability of States to experiment will be stunted. The fact that the people of one State cannot read some of the works of D. H. Lawrence seems to me, if not wise or desirable, at least acceptable. But that no person in the United States should be allowed to do so seems to me to be intolerable, and violative of both of the letter and spirit of the First Amendment.
>
> "I judge this case, then, in view of what I think is the attenuated federal interest in this field, in view of the very real danger of a deadening uniformity which can result from nation-wide federal censorship * * *." 354 U. S. at 506-507.

If the position of the government in this case is sustained then we are really in danger of having the Post Office Department also become a Department of Culture for the whole country.

CONCLUSION

Since the Court of Appeals for the District of Columbia Circuit decided an important question of federal law which has not been but should be settled by this Court, namely, that a federal obscenity statute with criminal sanctions, 18 U. S. C. §1461, 62 Stat. 768, 69 Stat. 183, authorizes the Postmaster General to exercise censorial powers of prior restraint over periodical publications by

withholding them from dispatch through the mails pending a determination of the issue of obscenity; since the hearing examiner of the Post Office Department, the federal district judge, and the Court of Appeals for the District of Columbia Circuit applied standards of obscenity in conflict with that which this court prescribed in *Roth* v. *United States* 354 U. S. 476 (1957); and since the Court of Appeals for the District of Columbia Circuit approved a hearing procedure which violated the due process clause of the Fifth Amendment; this petition for a writ of certiorari should be granted.

Respectfully submitted,

O. John Rogge
Attorney for Petitioner
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New York 13, New York

Appendix I

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12622

SUNSHINE BOOK COMPANY and SOLAIR UNION NATURISME, INC., APPELLANTS,

v.

ARTHUR E. SUMMERFIELD, Individually and as Postmaster General of the United States, APPELLEE.

On Rehearing En Banc

Decided October 3, 1957

Mr. John Rogge for appellants.

Mr. Donald B. MacGuineas, Attorney, Department of Justice, with whom *Messrs. Samuel D. Slade* and *Joseph Langbart*, Attorneys, Department of Justice, were on the brief, for appellee.

Mr. Edward deGrazia filed a brief on behalf of American Civil Liberties Union, as *amicus curiae*, urging reversal.

Before EDGERTON, Chief Judge, and PRETTYMAN, WILBUR K. MILLER, BAZELON, FAHY, WASHINGTON, DANAHER and BASTIAN, *Circuit Judges*, sitting *en banc*. (Circuit Judge

BURGER took no part in the hearing or consideration of this case.)

DANAHER, *Circuit Judge*, with whom Circuit Judges Prettyman, Wilbur K. Miller and Bastian concur, Circuit Judge Fahy concurring in the result and stating his views separately: Appellants, Sunshine Book Company and Solair Union Naturisme, Inc., sought in the District Court to enjoin the Post Office Department from refusing to transmit by mail the February, 1955, issue of "Sunshine & Health" Magazine and the January-February, 1955, issue of Sun Magazine. A Hearing Examiner in the Post Office Department had decided that the named issues are nonmailable because obscene as that term is used in 18 U.S.C. §1461 (1952).[1]

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[1] Pertinent portions applicable when the proceedings herein were commenced read:

"Every obscene, lewd, lascivious, or filthy book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character; and—

* * * *

"*Is declared* to be *nonmailable* matter and *shall not be conveyed in the mails* or delivered from any post office or by any letter carrier." (Emphasis supplied.) Cf. 18 U.S.C. §§ 1461, 1465 (Supp. IV 1957).

Pertinent regulations may be found in 39 C.F.R. as §§ 36.1, 36.2 and 36.7, issued under 5 U.S.C. §22 (1952) and 5 U.S.C. §369 (1952), as follows:

"§ 22. Departmental regulations. The head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it."

"§369. Duties of Postmaster General. It shall be the duty of the Postmaster General:

* * * *

"Ninth. To superintend generally the business of the department and execute all laws relative to the Postal Service."

Appendix I

After review of the appellants' exceptions to the Initial Decision and recommendations of the Hearing Examiner and the Department's reply thereto, the Solicitor of the Post Office Department affirmed. Concluding that the magazines contained photographs of naked men, women and children, are "obscene and indecent when judged by the ordinary community standards of the vast majority of citizens of this country," and noting that advertisements in the magazines indicate that they are offered freely for sale to the general public who are not members of a nudist organization, the Solicitor directed that the postmaster at Mays Landing, New Jersey, be instructed to treat the named issues as nonmailable.

In the District Court, appellants asked a declaration that the determination and order of the Department as applied be declared invalid as unconstitutional; that the Department be restrained permanently from withholding from dispatch in the United States mails the named issues of the magazines, and future numbers of these publications said to be substantially similar to the named issues here involved and to the magazines considered as exhibits in an earlier action[2]; a preliminary injunction

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[2] Summerfield v. Sunshine Book Company, 95 U.S. App. D.C. 169, 221 F. 2d 42 (D.C. Cir. 1954), *cert. denied*, 349 U.S. 921 (1955), which involved a proceeding under 39 U.S.C. §259a. There we concluded that the statute did not authorize the Postmaster General to predicate an order refusing mail privileges upon future, unpublished issues of the magazines despite the fact that past issues had contained allegedly obscene matter. Congress has since developed temporary and summary impounding procedures, free from the requirements of the Administrative Procedure Act, to be followed in such cases. See the Act approved July 27, 1956, 39 U.S.C. §259b (Supp. IV 1957). See S. Rep. No. 2234, 84th Cong., 2d Sess., 2 U.S. Code & Ad. News p. 3597 (1956). These sections are not involved in the instant case.

to the same effect pending final relief; and that the named issues be declared not to be obscene. Judge Kirkland denied relief, ruling that there was a substantial basis in fact and in law to support the Department's determination and, independently as trier, he concluded that the named issues, being obscene, are nonmailable.[3] After the appeal had here been argued, the court ordered rehearing *en banc*.[4]

Facts alleged, found and appearing of record may be succinctly summarized. About December 23, 1954, appellant Sunshine completed the printing of approximately 40,000 copies of the February, 1955, issue of the publication, "Sunshine & Health" of which 10,000 copies were to be circulated through the mails Approximately 30% of the total circulation of the second publication, "Sun-Magazine," was to be distributed through the mails. Appellants alleged that they receive a larger percentage of return on copies disseminated by mail to subscribers than from the sale of copies distributed by other means such as sales at news-stands. Between December 24, 1954, and December 31, 1954, appellant Sunshine Book Company caused some 400 copies of its February 1955 issue to be offered for mailing as third class matter through the post

[3] His opinion with its detailed findings and conclusions has been reported at length. See Sunshine Book Company v. Summerfield, 128 F. Supp. 564 (D.C.D.C. 1955).

[4] We heard argument September 25, 1956. We decided to postpone our decision herein because of the pendency in the Supreme Court of several cases, the decisions in which were deemed likely to have an important, if not controlling, bearing on the problems here raised. See, e.g., Roth v. United States, 354 U.S. 476 (1957); Alberts v. California, 354 U.S. 476; Kingsley Books, Inc. v. Brown, 354 U.S. 436.

office at Mays Landing, New Jersey. The Postmaster under date of December 29, 1954, submitted a sample copy of the questioned issue to the Solicitor for the Post Office Department for instructions, pursuant to the applicable regulation.[5] Under date of December 30, 1954, he was advised by the Solicitor that the questioned copies "subject to inspection" should be withheld from dispatch and that the senders should be informed that they might have "opportunity to show cause within fifteen days why the article should not be disposed of as matter nonmailable under . . . 39 C.F.R. 36.2" Under date of December 31, 1954, the postmaster informed the senders as to the opportunity to be heard, but erroneously also wrote that the questioned issue "is nonmailable and must be withheld from dispatch." The Solicitor under date of January 6, 1955, advised the senders as to the postmaster's error and pointed out that no ruling or determination as to mailability had been made either by the Solicitor or by any authorized person, that a hearing had been assigned for January 10, 1955, and that "every effort will be made to insure an expeditious consideration and ruling in this matter." Similar notice was given to Solar Universale Nudisme Magazine of a hearing assigned for January 11, 1955, to determine the mailability of its January-February, 1955, issue of Sun Magazine. On January 10, 1955, the Hearing Examiner "at the request of counsel for the publisher and with the agreement of the Solicitor" continued the hearings as to both magazines until January 17, 1955, when the hearings went

[5] C.F.R. § 36.7 and see *supra* note 1.

forward. On appeal from the examiner's initial decision, the Solicitor affirmed January 28, 1955, reciting details as to the photographic contents of the questioned publications which he found were offered freely for sale to the general public.

Meanwhile, proceedings had been instituted in the District Court on January 6, 1955, and, on January 18, 1955, the motion for preliminary injunction was denied. It was then ordered that "the status quo" be maintained until the completion of the administrative proceedings and that the case be advanced for trial to be heard January 31, 1955. Accordingly, the case was then heard and after argument, the court's oral ruling was pronounced. Findings of fact and conclusions of law were thereafter filed, and the judgment dismissing the appellants' amended complaint was entered February 16, 1955.

In court the Department stood upon the record of the papers and opinions which had been filed in the administrative proceeding which, without objection, were received. The trier offered to hear testimony. Appellants presented no "live" witnesses, and had none in court. In colloquy with the trial judge appellants' counsel outlined the nature of such testimony as might have been produced: as to community standards; that the photographs do not violate such standards; that nudism is growing in American life, "for instance, in the home"; and analysis, comparatively, of some nude photographs in certain magazines and of the sequence in "La Tuka," a motion picture of African tribal life. The trier ruled the proffer was irrelevant in terms of American com-

munity life measured by legal standards as applied to the magazine issues before the court. Counsel, in effect, concluded: "This brings us, then, far quicker than I thought we would get there to the issue of obscenity." It was the issue in the District Court, and is the issue here.

The statute[6] under which the proceedings went forward not only makes criminal the use of the mails for the transmission of proscribed matter, including obscene, lewd or lascivious pictures or publications of an indecent character, but all such matter is declared to be "non-mailable" and "shall not be conveyed in the mails."

Appellants' contentions that the statute "usurps powers impliedly and expressly reserved to the states in violation of the First, Ninth, and Tenth Amendments to the United States Constitution" have been answered by the Court in *Roth* v. *United States*,[7] where it was held expressly that "obscenity is not within the area of constitutionally protected speech or press." The majority further said:

> "Roth's argument that the federal obscenity statute unconstitutionally encroaches upon the powers reserved by the Ninth and Tenth Amendments to the

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[6] 18 U.S.C. § 1461 (1952), *supra* note 1, was later amended by the Act of June 28, 1955, U.S.C. § 1461 (Supp. IV 1957). Congress sought "to enlarge section 1461 of title 18, United States Code, so as to include within the prohibition of said section all matter of obscene nature, whether or not said matter had fallen within the more restricted definition contained in the statute." S. REP. No. 113 to accompany S. 600, 84th Cong., 1st Sess. The Report further advised the Senate that passage of the bill "will contribute greatly in the continuing struggle to combat juvenile delinquency and the corruption of public morals."

[7] 354 U.S. 476, 485 (1957).

States and to the people to punish speech and press where offensive to decency and morality is hinged upon his contention that obscenity is expression not excepted from the sweep of the provision of the First Amendment that *'Congress* shall make *no law* . . . abridging the freedom of speech, or of the press . . . .' (Emphasis added.) That argument falls in light of our holding that obscenity is not expression protected by the First Amendment. We therefore hold that the federal obscenity statute punishing the use of the mails for obscene material is a proper exercise of the postal power delegated to Congress by Art. I, §8, cl. 7.'"[8]

The command of the statute is such that if the issues of the magazines in question are nonmailable under 18 U.S.C. §1461, the Post Office Department is bound to deny access to the mails.[9] Arguing that a conclusion of "obscenity" is a matter of *opinion*, appellants insist that the Postmaster General's order was invalid as a matter of law. The Court tells us however that, while there may be marginal cases, obscenity is recognizable and may be distinguished from the portrayal of sex in art, literature and scientific works. "Obscene material is material which deals with sex in a manner appealing to prurient inter-

[8] *Id.* at 491-92.

[9] Roth v. Goldman, 172 F. 2d 788 (2 Cir. 1949), *cert. denied*, 337 U.S. 938 (1949); "It shall be the duty of the Postmaster General . . . to . . . execute all laws relative to the Postal Service." 5 U.S.C. § 369 (1952); as to the duty and power of the Postmaster General, compare Bates & Guild Co. v. Payne, 194 U.S. 106 (1904). Where the problem turns upon the exercise of judgment when the contents have not been found to be obscene, a wholly different case is presented. See, e.g., Hannegan v. Esquire, Inc., 327 U.S. 146, 149, 158 (1946).

est." The Court observed that the trial court "sufficiently followed the proper standard," having applied the test "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." Thus, the Court concluded:

> "In summary, then, we hold that [the federal statute] applied according to the proper standard for judging obscenity, do[es] not offend constitutional safeguards against convictions based upon protected material, or fail to give men in acting adequate notice of what is prohibited."[10]

Here, the trial judge carefully reviewed the authorities and applied the test[11] we had laid down in *Parmelee* v. *United States*[12] and which was quoted verbatim in the *Roth* charge, approved by the Court. Supplied by the trial judge were extensive, particularized descriptions of the offending and offensive material which need not here be repeated, as they speak for themselves. We deem the conclusions reached by the trial judge to be amply sustained. Appellants argue to us that the issue of obscenity is "not foreclosed by the finding of the trial court and is to be independently reviewed and determined by this court." Were we, as is urged, to go beyond the trier and to reach our own conclusion, we would have no hesitancy in deciding that what is before us is "ma-

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[10] 354 U.S. at 492 (1957).

[11] *Supra* note 3. Sunshine Book Company v. Summerfield, 128 F. Supp. at 568.

[12] 72 App. D.C. 203, 113 F. 2d 729 (D.C. Cir. 1940).

terial which deals with sex in a manner appealing to prurient interest," and hence is obscene, as *Roth* tells us.

Appellants ask us to say that our earlier decision[13] is *res judicata*. Quite apart from the fact that the many issues of the publications there involved differ from the exhibits before us in no substantial particular so far as their common pattern of nudity is concerned, some of them were more, and some less offensive in their portrayal of sexual indicia than the photographs in the exhibits with which we are now concerned. Most important, however, we did not in the earlier case reach or decide any such issue. On the contrary, we were concerned solely with the scope of the order of the Postmaster General which, we concluded, exceeded his authority. Indeed, we expressly authorized him to amend his orders to conform to the limitations we defined, and we found it unnecessary to inquire into or to pass upon his finding as to obscenity. Since we did not decide that the orders lacked a predicate of obscenity, appellants' reliance upon *res judicata* is totally without basis.

Were we, as appellants asked, to refer to the many issues received as exhibits in the earlier cases, we might readily spell out a continuous pattern of dissemination of nude photographs, a pattern in existence for many years. We would not ignore *Sunshine Book Co.* v. *McCaffrey*[14] where the court at page 483 said:

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[13] *Supra* note 2.

[14] 112 N.Y.S. 2d 476. There the appellants likewise were plaintiffs who sought a declaratory judgment and a permanent injunction against the Commissioners of Police and of Licenses of the

Appendix I

"Where the dominant purposes of nudity is to promote lust, it is obscene and indecent. The distribution and sale of the magazines in this case is a most objectionable example. The dominant purpose of the photographs in these magazines is to attract the attention of the public by an appeal to their sexual impulses. The sale of these magazines is not limited to any mailing list of members or subscribers. They are sold and distributed indiscriminately to all who wish to purchase the same. Men, women, youths of both sexes, and even children, can purchase these magazines. They will have a libidinous effect upon most ordinary, normal, healthy individuals. Their effect upon the abnormal individual may be more disastrous."

Nor do we see in the circumstances here a "prior restraint" against which to inveigh. The statute declares certain matter to be nonmailable which "shall not be conveyed in the mails." It may be supposed that the Post Office Department is not bound to sit idly by if instruments of crime, proscribed as nonmailable, are nonetheless offered for mailing. We may assume that the Department is not bound to permit the crime to be committed and only thereafter to proceed against one who mails the offending material. Here pursuant to the departmental regulations, the postmaster sought instructions. An administrative hearing was ordered which pro-

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City of New York. Their publications "Sunshine & Health" and "Sun Magazine" were before the court and appellants had been charged with violating § 1141 of the Penal Law of New York, referred to in Kingsley Books, Inc. v. Brown, *supra* note 4, 354 U.S. at 442.

ceeded expeditiously, both before the Department and the District Court. After application of the pertinent and appropriate standard, the questioned exhibits were found to be nonmailable. Here, there was no interference with some 30,000 copies of the questioned issue of "Sunshine & Health," and with some 70% of the questioned issue of "Sun Magazine," distributed otherwise than through the mails. Here was no injunction restraining the contemplated distribution of the publications to the public at large. Rather, only after hearing in accord with procedural safeguards antecedent to a determination of nonmailability, the Postmaster General has ruled that the facilities of the Post Office Department are not to be utilized, and the offending material "shall not be conveyed in the mails." There was no seizure, there was no restraint upon "the dissemination of future issues of a publication because its past issues had been found offensive."[15]

We are satisfied that it has been correctly determined that the issues of the magazines here in suit comprise nonmailable matter within the meaning of the statute. There is no error.

Affirmed.

FAHY, *Circuit Judge, concurring:* In addition to making it a crime to mail the matter it describes, the statute, 18 U.S.C. §1461 (1952), declares the matter to be non-

[15] Kingsley Books, Inc. v. Brown, *supra* note 4, 354 U.S. at 445.

mailable, and provides that it shall not be conveyed in the mails or delivered from any post office or by any letter carrier. Thus, as it seems to me, the statute is not solely a criminal one but is also one which closes the mail to obscene matter. This is not inconsistent with the First Amendment, *Roth* v. *United States*, 354 U.S. 476, or beyond the federal power; so that even though there has been no conviction of crime, there is reached the question whether the matter is of the kind the statute describes as nonmailable. The standards for determining this have been laid down by the Supreme Court, and the Department was here governed by equivalent standards; the Department applied the standards of the "dominant theme" and of the "contemporary community."

I do not disagree with the conclusion reached. Pictures permeate the magazine and the pictures are dominated by those which the contemporary community deems indecent. If this is so it cannot be but immaterial that much innocent text also appears in the magazine.

This leaves the question whether the departmental procedure met the requirements of due process. In *Kingsley Books, Inc.* v. *Brown*, 354 U.S 436, the Court sustained the New York "limited injunctive remedy" under the Fourteenth Amendment, applicable to state statute. I think the prompt and speedy administrative process accorded in the present case cannot be distinguished on a Fifth Amendment level, applicable to federal statute, from the procedure sustained in *Kingsley Books*. After the magazine was held, a longer time elapsed here than in that case before the nonmailable decision was reached;

but the Department moved expeditiously—in fact appellant requested additional time.[18]

Further congressional attention to procedure might be desirable, but this is not to say that the courts should hold invalid the procedure here followed, unless it is to be held that only a court or jury is capable under the Constitution of determining in the first or preliminary instance the question of obscenity.

WASHINGTON, *Circuit Judge*, with whom EDGERTON, *Chief Judge*, and BAZELON, *Circuit Judge*, join, dissenting:

"Obscenity is not expression protected by the First Amendment." *Roth* v. *United States*, 354 U.S. 476, 492 (1957). "Obscenity, real, serious, not imagined or puritanically exaggerated, is today as in all the past centuries, a public evil, a public nuisance, a public pollution." *Matter of Excelsior Pictures Corp.*, 3 N.Y. 2d. 237, ——, 165 N.Y.S. 2d 42, 49 (1957). "The validity of the obscenity laws is recognition that the mails may not be used to satisfy all tastes, no matter how perverted." *Hannegan* v. *Esquire, Inc.*, 327 U.S. 146, 158 (1946). Well established though these propositions may be, they do not answer the hard questions of an individual case. Has the publication been found "obscene" by a proper tribunal, applying proper standards? Has the punishment or remedy been authorized by proper legislation?

In the instant case, these questions have not yet been adequately answered. In the first place, it is not at all

[redacted] 80 U.S. App. D.C. 129, 149 F. 2d 511, the order [illegible] the pamphlet from the mails was issued without notice or hearing.

clear that the Post Office Department possesses any power to censor any class of mail, sealed or unsealed. Certainly Congress has never given such a power in so many words, nor has the Supreme Court ever expressly recognized the existence of such a power. The authority under which the Department is said to be operating in this field is a criminal statute passed in 1873:[1] it contains no language which directs the Department to refuse to transport and deliver newspapers and magazines pending final decision on its part as to whether their content is acceptable to it. "Some day Congress may perhaps give that authorization in specific terms, with proper guidance for and restrictions on administrative action, and with such safeguards as the Constitution may require. But Congress has not done so here." *Summerfield* v. *Sunshine Book Co.*, 95 U.S. App. D.C. 169 at 175, 221 F. 2d 42 at 48 (1954).[2] "All that Congress meant by this [1873] act was, that the mail should not be used to transport such corrupting publications and articles, and that any one who attempted to use it for that purpose should be punished." *Ex parte Jackson*, 96 U.S. 727 at 736 (1877).

The postal power permits the Federal Government to impose criminal sanctions for using the mails to distribute obscene materials. *Roth* v. *United States*, *supra*. Such sanctions, of course, are accompanied by the safeguards of a jury trial. See Brennan, J., dissenting in *Kingsley*

[1] REV. STAT. § 3893 (1875), as amended, 18 U.S.C. § 1461 (SUPP. IV, 1957).

[2] We were there speaking of another postal statute, 39 U.S.C. § 259(a) (1952).

Books, Inc. **v.** ***Brown,*** **354 U.S. 436, 447 (1957). Prior restraint is another story. A state statute has been upheld which permitted a limited form of judicial prior restraint against materials alleged to be obscene, through temporary injunction followed by prompt trial. See** ***Kingsley Books, Inc.*** **v.** ***Brown, supra.*** **It may be that the postal power would provide a basis for a Federal statute authorizing a similar form of judicial control. But an administrative prior restraint, not plainly authorized by statute and not subject to specified standards and safeguards, is of highly doubtful validity, to say the least.** ***Compare Holmby Productions, Inc.*** **v.** ***Vaughn,*** **350 U.S. 870, 919 (1955), reversing 177 Kan. 728, 282 P.2d 412 (1955).**

It may be argued that the duty of the Postmaster General "to execute all laws relative to the Postal Service," 5 U.S.C. §369 (1952), gives him some measure of authority over materials deposited in the mail in alleged violation of the criminal statute. It may be said, too, that the statute makes the materials non-mailable, and forbids their handling. These arguments hardly suffice. Congress has always "zealously watched and strictly confined" any proposal to empower the Postmaster General to refuse to handle mail because of its content. See ***Hannegan*** **v.** ***Esquire, Inc., supra,*** **at 156, n. 18. Surely the courts must take a like attitude, even if they conclude that the present statute does give the Postmaster General some part of the authority he now claims.[3] Certainly, under**

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[3] *Cf.* Roth v. Goldman, 172 F. 2d 788 (2d Cir.), *cert. denied*, 337 U.S. 938 (1949); One, Inc. v. Olesen, 241 F. 2d 772 (9th Cir.), cert. pending, 26 U.S.L. WEEK 3046 (1957).

any view, the courts must intervene if improper standards have been applied in making a determination of obscenity.[4] That has occurred in this case.

The test of obscentiy is "whether to the average person, applying contemporary community standards, the *dominant* theme of the material *taken as a whole* appeals to prurient interests." (Emphasis added.) *Roth* v. *United States*, *supra* at 489.[5] We expressed a similar thought in *Walker* v. *Popenoe*, 80 U.S.App.D.C. 129,130, 149 F.2d 511, 512, (1945), where we said: "The statute [now 18 U.S.C. §1461] does not bar from the mails an obscene phrase or an obscene sentence. It bars an obscene 'book, pamphlet . . . or other publication . . . .' If a publication as a whole is not stimulating to the senses [*i.e.*, does not "arouse the salacity"] of the ordinary reader, it is not within the statute. . . . The *dominant* effect of an entire publication determines its character." (Emphasis in original.) See also *Parmelee* v. *United States*, 72 App.

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[4] There is broad authority to review even factual matters when freedom of speech and of the press is involved. *Cf.* Niemotko v. Maryland, 340 U.S. 268, 271 (1951); Reed J., concurring in Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 506 (1952); Dye, J., dissenting in Commercial Pictures Corp. v. Board of Regents of University of State of New York, 305 N.Y. 336, 356, 113 N.E. 2d 502, 512 (1953), *reversed sub nom.* Superior Films v. Dept. of Education, 346 U.S. 587 (1954).

[5] The test traditionally applied by the English courts was stated in Regina v Hicklin [1868], L.R. 3 Q.B.D. 360, 371 "whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall." *But see* Regina v. Martin Secker Warburg, Ltd. [1954], 2 All E.R. 683. That test "might well encompass material legitimately treating with sex, and so it must be rejected as unconstitutionally restrictive of the freedoms of speech and press." Roth v. United States, 354 U.S. at 489.

D.C. 203, 113 F.2d 729 (1940); *United States* v. *Dennett*, 39 F.2d 564 (2d Cir. 1930); *United States* v. *One Book Entitled Ulysses*, 72 F.2d 705 (2d Cir. 1934); *United States* v. *Levine*, 83 F.2d 156 (2d Cir. 1936). In these cases, works which the courts found to be of genuine sociological, medical, or literary merit were held not obscene, although portions of them, taken from context, might appear otherwise.

In the instant case, the magazines "advocate and explain nudism and the nudist mode of living." *Summerfield* v. *Sunshine Book Co.*, 95 U.S.App.D.C. at 170, 221, F.2d at 43. One of the magazines has been published for over twenty years. Their texts were found by the Post Office Department and the District Court not to be obscene. But both the Department and the District Court thereupon proceeded to deal with the illustrations in the magazines merely as such. The Examiner of the Post Office Department and the District Court explicitly recognize in their opinions that the publications must be considered as a whole.[6] Yet an examination of their opinions, as well as that of the Solicitor of the Post Office Department, shows no effort to weigh the material considered objectionable against the rest of the contents, or to weigh the risk in permitting the former to circulate against the limitations on freedom of the press implicit in halting circulation of the latter.[7]

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[6] See Walker v. Popenoe, *supra* at p. 130 of 80 U.S. App. D.C., at p. 512 of 149 F. 2d.

[7] It is also questionable whether finding a picture "grotesque" sufficiently complies with the Supreme Court's mandate requiring a finding of appeal to "prurient interest." *Compare* Sunshine Book Co. v. Summerfield, 128 F. Supp. 564, 571 (D.D.C. 1955), *with* Roth v. United States, 354 U.S. at 489 (1957).

Appendix I

Another aspect of the case is equally disturbing. More than a decade ago we held in *Walker* v. *Popenoe, supra,* that a hearing must precede the barring of published matter from the mails. Here, the Department refused to accept the magazines for mailing, and held a hearing after its refusal had become effective.[8] We expressly condemned such an intererence with freedom of the press in the *Walker* case, where we said:

"We are not impressed with the argument that a rule requiring a hearing before mailing privileges are

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[8] The District Judge found that the refusal of the Post Office Department to transmit the magazines in question began on or about December 23, 1954. By letter of December 30, 1954, the Solicitor of the Post Office Department acknowledged a letter of December 29, 1954, from the Postmaster of Mays Landing, New Jersey, which set forth the action taken. The Solicitor advised that the magazines "should be withheld from dispatch," except for copies submitted for first class mailing, and that the senders "should be informed that they may have an opportunity to show cause within fifteen days why the article should not be disposed of as matter nonmailable . . . by offering through appearance at this [the Solicitor's] office in person or by attorney, or through submission of a statement in writing, whatever evidence or arguments they care to submit."

The Postmaster of Mays Landing transmitted this information to appellant by letter of December 31, 1954. He added that the magazines in question were "nonmailable and must be withheld from dispatch." By letter of January 6, 1955, to appellant, the Solicitor acknowledged that the Postmaster's statement as to nonmailability was in error, "no ruling or determination either of mailability or non-mailability having yet been made. . . . . " He also gave notice of a hearing on the question to be held on January 10, 1955. But no action was taken to transmit the magazines in the mail. At appellant's request, the hearing was postponed to January 17, 1955. At the hearing, the Examiner ruled, correctly, we think, and without objection by the Post Office Department, that the burden of proof rested on the Post Office Department rather than appellant. An initial decision was handed down by the Examiner on January 20, 1955, and affirmed by the Solicitor on January 28, 1955. It is thus evident that appellant's magazines were barred from the mails for almost a month before the hearing and the initial administrative decision that they were unmailable.

suspended would permit, while the hearing was going on, the distribution of publications intentionally obscene in plain defiance of every reasonable standard. In such a case the effective remedy is the immediate arrest of the offender for the crime penalized by this statute. Such action would prevent any form of distribution of the obscene material by mail or otherwise. If the offender were released on bail the conditions of that bail should be a sufficient protection against repetition of the offense before trial. But often mailing privileges are revoked in cases where the prosecuting officers are not sure enough to risk criminal prosecution. That was the situation here." 80 U.S.App.D.C. at 132, 149 F.2d at 514.[9]

For these reasons the order of the Post Office Department should be held invalid. Under all the circumstances —the passage of time and the disregard by the Post Office Department of our ruling in the *Walker case*—further administrative proceeding with respect to the magazine issues here involved should not be permitted. The case should be remanded to the District Court with instructions to issue an injunction permanently restraining enforcement of the Department's order.

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[9] See Roth v. United States, 1 L. Ed. 2d 34 (1956) (per Harlan, Circuit Justice).

Judgment

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12,622—April Term, 1957

C.A. 74-55

SUNSHINE BOOK COMPANY and SOLAIR UNION NATURISME, INC.,

Appellants,

v.

ARTHUR E. SUMMERFIELD, Individually and as Postmaster General of the United States,

Appellee.

APPEAL FROM the United States District Court for the District of Columbia.

BEFORE: Edgerton, Chief Judge, and Prettyman, Wilbur K. Miller, Bazelon, Fahy, Washington, Danaher and Bastian, Circuit Judges, sitting en banc. (Circuit Judge Burger took no part in the hearing and consideration of this case.)

THIS CAUSE came on to be reheard en banc on the record from the United States District Court for the District of Columbia, and was reargued by counsel.

ON CONSIDERATION WHEREOF, It is ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, affirmed.

Dated: October 3, 1957.

Per Circuit Judge Danaher.

Separate concurring opinion by Circuit Judge Fahy.

Separate dissenting opinion by Circuit Judge Washington, with whom Chief Judge Edgerton and Circuit Judge Bazelon join.

Appendix II

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12622

SUNSHINE BOOK COMPANY AND SOLAR UNION NATURISME, INC., APPELLANTS,

v.

ARTHUR E. SUMMERFIELD, INDIVIDUALLY AND AS POSTMASTER GENERAL OF THE UNITED STATES, APPELLEE.

Appeal from the United States District Court for the District of Columbia

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Decided May 31, 1956

Mr. Murray A. Gordon, of the bar of the Court of Appeals of New York, *pro hac vice*, by special leave of Court, and *Mr. O. John Rogge*, for appellants.

Mr. Donald B. MacGuineas, Attorney, Department of Justice, of the bar of the Supreme Court of Illinois, *pro hac vice*, by special leave of Court, with whom *Messrs. Samuel D. Slade* and *Joseph Langbart*, Attorneys, Department of Justice, were on the brief, for appellee.

Mr. Edward de Grazia filed a brief on behalf of American Civil Liberties Union, as *amicus curiae*, urging reversal.

Appendix II

Before EDGERTON, Chief Judge, and WASHINGTON and DANAHER, Circuit Judges.

WASHINGTON, *Circuit Judge*: The complaint here sought to enjoin the Post Office Department from refusing to transmit by mail the February, 1955, issue of Sunshine & Health Magazine and the January-February, 1955, issue of Solaire Universelle Nudisme Magazine. A hearing examiner in the Post Office Department decided that the issues in question are unmailable under 18 U.S.C. § 1461 (1952) because they are "obscene, lewd, lascivious and indecent." The Solicitor of the Department affirmed, and an appropriate order was entered. In the injunction proceeding the District Court found as a fact that "the magazines are obscene, lewd, lascivious, filthy and indecent." Its conclusions of law were that there was substantial evidence to support the Post Office Department's conclusion, and, independently, that the magazines are non-mailable. It dismissed the complaint. *Sunshine Book Co.* v. *Summerfield*, 128 F. Supp. 564 (D. D.C. 1955). This appeal followed.

The two particular issues of the magazines in question here conform essentially to the description of prior issues of these magazines set forth in *Summerfield* v. *Sunshine Book Co.*, 95 U.S.App.D.C. 169, 221 F.2d 42 (1954), cert. denied, 349 U. S. 921 (1955). A more detailed description of the pictorial content of the magazines is to be found in the opinion of the District Court, cited above. It is unnecessary to enlarge upon their content in this opinion.

Whatever the scope of our authority to review factual determinations in situations such as this, and we think

it is a broad one when First Amendment considerations are involved,[1] it is clear that we must intervene if improper standards have been applied in making the determination of obscenity. We think that has occurred here.

In *Walker* v. *Popenoe*, 80 U.S.App.D.C. 129, 130, 149 F.2d 511, 512 (1945), we said (quoting from *United States v. Levine*, 83 F.2d 156, 158 (2d Cir. 1936)): "The standard must be the likelihood that the work will so much arouse the salacity of the reader to whom it is sent as to outweigh any literary, scientific or other merits it may have in that reader's hands." See also *Parmelee* v. *United States*, 72 App.D.C. 203, 113 F.2d 729 (1940); *United States* v. *Dennett*, 39 F.2d 564 (2d Cir. 1930); *United States* v. *One Book Entitled Ulysses*, 72 F.2d 705 (2d Cir. 1934). In these cases, works which the courts found to be of genuine sociological, medical, or literary merit were held not obscene, although portions of them, taken from context, might appear otherwise.

In the instant case, the magazines "advocate and explain nudism and the nudist mode of living." *Summerfield* v. *Sunshine Book Co.*, 95 U.S.App.D.C. at 170, 221 F.2d at 43. Their texts were found by the Post Office Department and the District Court not to be obscene. But both the Department and the District Court thereupon pro-

[1] *Cf.* Niemotko v. Maryland, 340 U.S. 268, 271 (1951); Reed, J., concurring in Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 506 (1952); Dye, J., dissenting in Commercial Pictures Corp. v. Board of Regents of University of State of New York, 305 N.Y. 336, 356, 113 N.E. 2d 502, 512 (1953), *reversed sub nom.* Superior Films v. Dept. of Education, 346 U.S. 587 (1954).

ceeded to deal with the illustrations in the magazines merely as such. The Examiner of the Post Office Department and the District Court explicitly recognize in their opinions that the publications must be considered as a whole.[2] Yet an examination of their opinions, as well as that of the Solicitor of the Post Office Department, shows no effort to weigh the material considered objectionable against the rest of the contents, or to weigh the risk in permitting the former t circulate against the limitations on freedom of the press implicit in halting circulation of the latter. Furthermore, neither the Department nor the District Court appears to have investigated or considered the intent of the publisher, one of the important elements in obscenity cases. *Parmelee* v. *United States*, *supra*, 72 App.D.C. at 209, 113 F.2d at 735; *United States* v. *One Book Entitled Ulysses*, *supra*, 72 F.2d at 707, 708. "Honest, sincere" works must be distinguished from publications "wholly for the purpose of profitably pandering to the lewd and lascivious." *Parmelee* v. *United States*, *supra*, 72 App.D.C. at 209, 210, 113 F.2d at 735, 736.[3] If the matter of intent had been considered, substantial evidence of sincerity of motive, and lack of "profitable pandering," was contained in uncontroverted affidavits by the managing editor of the magazines in question, who is an ordained Baptist minister, and by the editor of the magazines, his daughter.

Another aspect of the case is equally disturbing. More than a decade ago we held in *Walker* v. *Popenoe*, *supra*,

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[2] See Walker v. Popenoe, *supra* at p. 130 of 80 U.S. App. D.C. at p. 512 of 149 F. 2d.

[3] The latter phrase was quoted from Lynch v. United States, 285 Fed. 162, 163 (7th Cir. 1922).

that a hearing must precede the barring of published matter from the mails. Here, the Department refused to accept the magazines for mailing, and held a hearing after its refusal had become effective.[4] Such conduct is an interference with freedom of the press expressly condemned in the *Walker case*, where we said:

> "We are not impressed with the argument that a rule requiring a hearing before mailing privileges are suspended would permit, while the hearing was going on, the distribution of publications intentionally ob-

[4] The District Judge found that the refusal of the Post Office Department to transmit the magazines in question began on or about December 23, 1954. By letter of December 30, 1954, the Solicitor of the Post Office Department acknowledged a letter of December 29, 1954, from the Postmaster of Mays Landing, New Jersey, which set forth the action taken. The Solicitor advised that the magazines "should be withheld from dispatch," except for copies submitted for first class mailing, and that the senders "should be informed that they may have an opportunity to show cause within fifteen days why the article should not be disposed of as matter nonmailable . . . by offering through appearance at this [the Solicitor's] office in person or by attorney, or through submission of a statement in writing, whatever evidence or arguments they care to submit."

The Postmaster of Mays Landing transmitted this information to appellant by letter of December 31, 1954. He added that the magazines in question were "nonmailable and must be withheld from dispatch." By letter of January 6, 1955, to appellant, the Solicitor acknowledged that the Postmaster's statement as to nonmailability was in error, "no ruling or determination either of mailability or non-mailability having yet been made . . . . ." He also gave notice of a hearing on the question to be held on January 10, 1955. But no action was taken to transmit the magazines in the mail. At appellant's request, the hearing was postponed to January 17, 1955. At the hearing, the Examiner ruled, correctly, we think, and without objection by the Post Office Department, that the burden of proof rested on the Post Office Department rather than appellant. An initial decision was handed down by the Examiner on January 20, 1955, and affirmed by the Solicitor on January 28, 1955. It is thus evident that appellant's magazines were barred from the mails for almost a month before the hearing and the initial decision that they were unmailable.

scene in plain defiance of every reasonable standard. In such a case the effective remedy is the immediate arrest of the offender for the crime penalized by this statute. Such action would prevent any form of distribution of the obscene material by mail or otherwise. If the offender were released on bail the conditions of that bail should be a sufficient protection against repetition of the offense before trial. But often mailing privileges are revoked in cases where the prosecuting officers are not sure enough to risk criminal prosecution. That was the situation here." 80 U.S.App.D.C. at 132, 149 F.2d at 514.

We adhere to the views we expressed in *Walker*. They apply with equal force to books magazines and newspapers, all of which are entitled to the protection of the First Amendment. And they apply with special force to a magazine like the present one, with a long record of publication and with no charge against it of obscenity of text. That additional administrative difficulties may be imposed on the Post Office Department in its efforts to prevent the mailing of magazines and newspapers alleged to contain obscene items is a matter we decline to evaluate. The authority under which the Department is operating in this field is a criminal statute passed in 1873: it contains no language which can be construed to permit the Department to refuse to transport and deliver newspapers and magazines pending final decision on its part as to whether their content is acceptable to it.[5] "Some day Congress may perhaps give that authorization in specific

[5] "All that Congress meant by this act was, that the mail should not be used to transport such corrupting publications and articles, and that any one who attempted to use it for that purpose should be punished." Ex parte Jackson, 96 U.S. 727 at 736 (1877).

terms, with proper guidance for and restrictions on administrative action, and with such safeguards as the Constitution may require. But Congress has not done so here." *Summerfield* v. *Sunshine Book Co., supra* at page 175 of 95 U.S.App.D.C. and at page 48 of 221 F.2d.

For these reasons, we conclude that the order of the Post Office Department is invalid. Under all the circumstances, having noted the passage of time and the disregard by the Post Office Department of our ruling in the *Walker* case, we think we would not be justified in permitting further administrative proceedings with respect to the magazine issues here involved. We need not, in view of this disposition, discuss the other matters raised by the parties. The case will be remanded to the District Court with instructions to issue an injunction permanently restraining the enforcement of the Department's order.

So ordered.

DANAHER, *Circuit Judge*, dissenting: While the present case reaches us in a different posture than *Summerfield* v. *Sunshine Book Co.*,[1] I shall only briefly supplement my dissent therein.[2] The publications in the former action do not differ markedly from those relied upon here as to which detailed findings were set forth by District Judge Kirkland.[3] Surely unable to dispute the trial

[1] 95 U.S. App. D.C. 169, 221 F. 2d 42 (D.C. Cir. 1954), *cert. denied*, 349 U.S. 921 (1955).

[2] *Id.*, 95 U.S. App. D.C. at 175, 221 F. 2d at 48.

[3] Sunshine Book Co. v. Summerfield, 128 F. Supp. 564 (D.C. 1955).

judge's verbal delineation of the pictorial content, the majority say he applied "improper standards" in making the determination of obscenity. I submit that a mere reading of the majority opinion against *Walker* v. *Popenoe*[4] will demonstrate the distinction between the two.

The exhibits here were obscene by any standard, in my judgment. They were so, even applying the *Walker* "standards," because (1) of the effect on the ordinary reader, (2) of the effect of the publications as a whole and (3) the "*dominant*" effect of the publications determines their character.[5] Here was no "plain but decent" publication with an obvious purpose "to educate, and so to benefit, persons who are about to marry."[6] For one who has not seen the photographs, Judge Kirkland's descriptions[7] will provide a reasonably accurate post-view, at least sufficiently so, to convey the "*dominant*" effect. Lack of reference by the Solicitor to the text of the instant publications may be pardoned since the text is so completely subordinate to the more dominant photographs. In other circumstances, cases will show, we have had no trouble deducing "intent" from what was done. No, this case is not like the *Walker* case where the order was issued "without notice or hearing,"[8] a circumstance

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[4] 80 U.S. App. D.C. 129, 149 F. 2d 511 (D.C. Cir. 1945).

[5] *Id.*, 80 U.S. App. D.C. at 130, 149 F. 2d at 512.

[6] *Id.* It is to be doubted that the publications are intended "to educate, and so to benefit, persons who are" unmarried, but that may be an "obvious" result.

[7] *Supra* note 3.

[8] *Supra* note 4, 80 U.S. App. D.C. at 131, 149 F. 2d at 513. Neither this case nor Parmelee v. United States, *supra*, strikes at the statute: surely we may assume its validity. Ex parte Jackson, 96 U.S. 727 (1878); and see, Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

which we said constituted a denial of due process. Here, undoubtedly the Postmaster General sought to proceed in the light of our opinion in the former *Sunshine Book Co.* case.[9]

The chief Hearing Examiner rendered his decision after applying the test of obscenity laid down by this court in *Parmelee* v. *United States,* 72 App. D.C. 203, 113 F. 2d 729 (D.C. Cir. 1940). His findings were reasonable and, in my view, totally justified. Appellants had the benefit of the administrative remedies open to them. Then followed recourse to the District Court.

The Statute[10] in pertinent part, provides:

> "Every obscene, lewd, lascivious, or filthy book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character;
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> * * * * *
>
> "Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier . . . ."

That is what Congress said, and it seems to me to be plain and clear and unequivocal. My colleagues say that the views expressed in the *Walker* case "apply with equal force to books, magazines and newspapers, all of which are entitled to the protection of the First Amendment." I see no such issue here. These magazines are not being barred in advance. They may even be mailed, first class, when sealed, and after appropriate postage has

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[9] *Supra* note 1.

[10] 18 U.S.C. § 1461 (1952).

been paid. They may be transported, by trucks, by air express; and by railroad. Congress had not suppressed by statute nor has the Postmaster General here suppressed by prior action, the publication and distribution of the magazines, in violation of any First Amendment rights.[11] Congress has simply said that obscene matter is not entitled to third-class privileges, and accordingly the United States mails are not open for the distribution of these obscene publications, in part at public expense. Congress has actually assumed mounting deficits for the transportation of qualifying publications which meet Congressional standards, and has been willing that a large share of the cost of mailing them should be borne by all the people in the public interest and as a matter of public policy. But with equal clarity, in the same public interest and as a matter of public policy, it has denied such third-class privileges to those who would use the mails to disseminate obscene matter.[12] Acting pursuant to the command of Congress, the Postmaster General initiated these proceedings.

Through the Solicitor, on January 6, 1955, one of the appellants was given notice that a hearing to determine mailability or nonmailability would be held on January 10, 1955, and that "every effort will be made to insure an expeditious consideration and ruling in this matter." The other appellant on the same date was notified of a hearing to be held on January 11, 1955. Both hearings

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[11] See opinions in Brown v. Kingsley Books, Inc. et al.; — N.Y. —. (N.Y. Ct. App., April 27, 1956), 24 U.S.L. Week 2529.

[12] Cf. Hannegan v. Esquire, Inc., 327 U.S. 146, 152, 158-59 (1946).

had as their objective, a determination as to whether or not the magazines were "obscene, lewd, lascivious and indecent and, therefore, nonmailable matter, which shall not be conveyed in the mails or delivered from any post office . . . under the provisions of Title 18, United States Code, section 1461." The respective appellants were advised of their procedural rights.[13] In my judgment, the course followed coincided with the requirements of the statute, and after every procedural step had been taken, and after the District Court had fully considered the subject matter, correct conclusions were reached upon findings amply supported by the evidence.

I think it is our duty to affirm the judgment of the District Court.

[13] The Solicitor found that the publication in suit was "offered freely for sale to the general public who are not members of the nudist organization." He entered a post-publication order that the issue is obscene. There was no impermissible "prior restraint" in any event.

Appendix III

Civ. A. No. 74–55

SUNSHINE BOOK COMPANY,

Plaintiff,

—v.—

ARTHUR E. SUMMERFIELD, Individually and as Postmaster General of the United States,

Defendant.

United States District Court
District of Columbia

Jan. 31, 1955.

O. JOHN ROGGE and JOSIAH LYMAN, Washington, D. C. *for plaintiff.*

EDWARD H. HICKEY, DONALD B. MACGUINEAS, Washington, D. C., JOSEPH LANGBART, Arlington, Va., *for defendant.*

KIRKLAND, *Judge.*

There is before the Court the case of Sunshine Book Co. v. Summerfield individually and as Postmaster General of the United States, defendant, in Civil Action No. 74–55.

The complaint was originally filed January 6, 1955, and there has been an amended complaint filed on January 18.

1955. They differ in only one slight particular. The gravamen of the complaint of January 6, 1955, was directed to injunctive relief sought by the plaintiff against the impounding of some 400 copies of the magazine Sunshine & Health for February, 1955, at the Mays Landing, New Jersey, Post Office, and, as well, a separate claim for declaratory judgment that this particular magazine was not obscene.

The amended complaint also has attached as an exhibit Sun Magazine of the issue of January-February, 1955, and seeks in a third claim a declaratory judgment that the character of that magazine is not obscene in fact.

Historically, the facts of this case indicate that on approximately December 23, 1954, the Postmaster of Mays Landing, New Jersey, Post Office, gave notice to the depositor, namely, the plaintiff here and subsidiary groups including Solar Union Naturisme, Inc., that the deposit of these magazines on instruction of the Postmaster General was being withheld from the United States mails.

At the same time notice was given of an administrative hearing before the Solicitor for the Post Office Department. The hearing began on January 16, 1955, and after several postponements has proceeded to a conclusion and there has been filed in the action of this case today the administrative finding of the Postmaster through his subordinates the trial examiner and the Solicitor for the Post Office Department, and that finding has been that the "review of the entire official record * * * upon substantial evidence * * * indicates that the magazines in question contain photographs of naked men, women and children,

principally women, clearly revealing genitals, breasts and other portions of the body normally covered in public." It concludes that, "From the advertisements therein contained, that they are offered freely for sale," and the Post Office Department through its officials in this hearing has made a finding of fact that "The photographs appear obscene and indecent when judged by the ordinary community standards of the vast majority of citizens of this country."

Continuing with the historical portion of the case, there was filed at the outset with the complaint of January 6 a motion for a temporary restraining order. That was heard briefly and denied, and a date was set for the hearing of the temporary injunction, which upon hearing was likewise denied, and so it was brought up until this date, January 31, 1955, for the determination of the then pending status of the case on the final injunction.

At the time this particular Court heard the argument of the motion for a temporary injunction one of the issues raised was, and properly raised, that the administrative remedies had not been exhausted. The Court heard argument on both sides of the question and concluded that from the Congressional enactments and the customs and procedures followed that the initial determination under Title 18 U. S. C. §1461, the obscenity statute, lay with the Postmaster General, and accordingly the Court gave directions that that should first be settled and disposed of, as the record now reveals it has been, and then the matter on the nature of the finding, as well as the question raised by the pleadings, would be decided today.

Accordingly, on the record of the case, including the pleadings, the affidavits appended, affidavits appended to Civil Action 3007–53, the Court on opening statements has narrowed the issues of this particular case.

The Court has ruled that there is provision under this statute, Title 18 U. S. C. §1461, for the Postmaster General to conduct hearings and examinations into the alleged obscenity of publications, pamphlets, pictures, papers, letters, prints or other publications; that Title 18 U. S. C. §1461 is not unconstitutional; that due process under the Fifth Amendment was provided for by a hearing in which either testimony, or review of the magazines and the pictures contained therein by visual observation, and the helpful argument of counsel did constitute a proper hearing within that provision. The Court has also ruled that under Title 18, U. S. C. §1461, there is not a denial of the provisions of the First Amendment to the Constitution.

The Court also ruled preliminarily that the administrative hearing was one contemplated by the Congress and one carried out properly by its designated agent, the Postmaster General; that the scope was not essentially criminal in character, though criminal provisions are applied because the statute carefully declared that whatever was obscene, lewd, lascivious, filthy or of an indecent nature as it applied to any book, pamphlet, picture, paper, letter, print or other publication should be declared not to be mailable and should not be conveyed in the mails or delivered from any post office or by any letter carrier; that the Court was not confined to a mere determination of whether the finding of the Postmaster General from his

hearing was arbitrary and capricious but that the Court in the status of this case which antedated the actual finding in the proceedings themselves, as well as the review of the proceedings, had the right to pass upon whether there was a foundation for the Postmaster in his finding that these two publications were obscene.

That left open the sole question of whether the two publications were obscene as a matter of fact and as a matter of law.

Counsel have very ably presented the matter. They have been very careful to indicate their industry, and their deep professional learning.

Accordingly, we are in the posture of determining the standards by which to judge these particular magazines.

First of all, nudity is not, per se, obscene, as the case of Parmelee v. United States, from our own circuit, reported in 72 App. D. C. 203, 113 F. 2d 729, was clear to point out. However, we must steer a course, in the clash of these legal interests, between what is art on the one hand, pornography on the other; what is decent on the one hand as against what is indecent on the other; and what is conformity to the mores of the District of Columbia, the State of New Jersey and America in general. Accordingly, we must first consider the definitions which have been handed down in interpreting the mandate of Congress.

Title 18 U. S. Code, §1461 lays down five descriptive adjectives of what will constitute the basis of obscenity in general. Congress has used the words, "obscene",

"lewd", "lascivious", "filthy" and "indecent" and has applied them to books, pamphlets, pictures, papers, letters, prints and other publications.

This, of course, is a magazine. It is a publication. There are contained within it pictures. Accordingly, in that aspect of the statute, this Court has jurisdiction.

It is declared if they are found to be obscene they are to be non-mailable, they are not to be transported or conveyed in the mails, and they are not to be delivered from any post office or by any letter carrier.

Those parts are clear and do not need definition. But there is a need of definition as to what the Congress meant in the employment of the five adjectives.

In connection with the definition of "obscene" the Supreme Court in Dunlop v. United States, 165 U. S. 486, 17. S. Ct. 375, 41 L. Ed. 799, has declared that obscenity or the adjective "obscene" must be calculated to lower that standard which we regard as essential to civilization or calculated with the ordinary person to deprave his morals or lead to impure purposes.

In the case of United States v. One Obscene Book Entitled "Married Love," 48 F. 2d 821, from the Southern District of New York, decided in 1931, the Court there declared that obscenity means to be offensive to the senses or to the taste, refinement, disgusting, repulsive, filthy, foul, abominable, loathsome, offensive to modesty or decency, expressing or suggesting unchaste or lustful ideas; impure, indecent, lewd.

Appendix III

In our own local case, Parmelee v. U. S., 72 App. D. C. 203, 113 F. 2d 729, 730, decided in 1940, the Court said, and I quote: "Obscenity is not a technical term of the law and is not susceptible of exact definition. * * * Probably the fundamental reason why the word obscene is not susceptible of exact definition is that such intangible moral concepts as it purports to connote, vary in meaning from one period to another."

In the case of United States v. Two Obscene Books, 99 F. Supp. 760, from the District Court of California, decided in 1951, the Court indicated that the definition of "obscene" is: Offensive to chastity and modesty; that form of indecency which is calculated to promote the general corruption of morals; has a tendency to deprave or corrupt the morals of those whose minds are open to such influences and into whose hands it may fall by allowing or implanting in such minds obscene, lewd, or lascivious thoughts or desires.

Passing on to the second word which appears in the statute, namely, the word "lewd," it has been defined in United States v. Slenker, D. C., 32 F. 691, as having a tendency to excite lustful thoughts.

In the case of United States v. Males, decided in D. C., 51 F. 41, the word "lewd" has been defined as licentious.

The third word is the word "lascivious." In the case of United States v. Clarke, D. C. 38 Fed. 732, that word was defined as synonymous with "lewd"; dissolute, unchaste, calculated to excite lustful and sensual desires in those whose minds are open to such influences.

Appendix III

In the case of Swearingen v. United States, 161 U. S. 446, 16 S. Ct. 562, 40 L. Ed. 765, it was defined as: Tending to excite lust; lewd, indecent; obscene; relating to sexual impurity; tending to deprave the morals in respect to sexual relations.

The fourth word is the word "filthy." That has been defined in United States v. Davidson, D. C. 244 F. 523, as: Morally foul, polluted, nasty.

In the case of Tyomies Publishing Co. v. United States, 6 Cir., 211 F. 385, it was defined as: Dirty, vulgar, indecent, offensive to the moral sense, morally depraving, debasing.

In the case of United States v. Limehouse, 285 U. S. 424, 525 S. Ct. 412, 76 L. Ed. 843, it was defined to mean matter that, though not lewd or obscene, it nevertheless had a tendency to corrupt or debauch.

The definition of the last of these five adjectives, the word "indecent," has been stated in United States v. Davidson, D. C. 244 F. 523, to be: Offensive to common propriety; offending against modesty or delicacy; grossly vulgar, obscene, lewd.

And in the case of United States v. Smith, C. C., 11 F. 663, the word "indecent" is defined as: Immodest, impure.

Those definitions are the beacons by which the legal channel is lighted for the Court to arrive at findings of fact and conclusions of law in this case.

Next, it is clear that under the law, as the trier of the facts, the Court is to apply the test of the normal, reason-

able person, and the findings are, to be predicated upon his—that is, the normal, reasonable, prudent person's—determination.

In the case of Walker v. Popenoe, reported at 80 U. S. App. D. C. 129, 149 F. 2d 511, particularly with regard to the law on obscenity and the tests applying thereto, our Circuit Court of Appeals 149 F. 2d at page 512, stated that there should be three classifications, and laid them down by way of tests, as follows:

First, "The effect of a publication on the ordinary reader is what counts. The statute does not intend that we shall 'reduce our treatment of sex to the standard of a child's library in the supposed interest of a salacious few.'"

Second, "The statute does not bar from the mails an obscene phrase or an obscene sentence. It bars an obscene 'book, pamphlet * * * or other publication * * *.' If a publication as a whole is not stimulating to the senses of the ordinary reader, it is not within the statute."

Third, "It would make nonsense of the statute to hold that it covers works of value and repute merely because their incidental effects may include some slight stimulation of the senses of the ordinary reader. The dominant effect of an entire publication determines its character."

As was pointed out in the case of Parmelee v. United States, 72 App. D. C. 203, 113 F. 2d 729, the modern rule was restated with emphasis, and 113 F. 2d at page 731 the Court said, and this trial court quotes:

"But more recently this standard has been repudiated, and for it has been substituted the test that a book must

be considered as a whole, in its effect, not upon any particular class, but upon all those whom it is likely to reach."

It has been urged upon the Court that the finding of my brother Judge Henry Schweinhaut, in the case of Summerfield v. Sunshine Book Co., No. 12,026, D. C. Cir., 221 F. 2d 42 is controlling both as to the law and the facts in this particular case, both on the doctrine of stare decisis and res judicata.

The Court rules that on the doctrine of stare decisis it is not controlling for the reason that the standards of that case by which another court could judge the findings are not set forth, and is actually complained of in the majority view of the Circuit Court of Appeals when the majority states, "In this view of the case, it does not become necessary to pass upon other questions raised by the appellees as to the constitutionality or applicability of this statute, as to the propriety of the Postmaster General's finding that the publications involved in his orders were obscene, see Parmelee v. United States, 1940, 72 App. D. C. 203, 1 3 F. 2d 729,"—and the Court with emphasis adds—"or the adequacy of the evidence and record upon which such a finding was based in the instant case."

There the Postmaster General made a very short finding unlike the finding he has made in the instant case. He merely found that some 25 copies of magazines of the same publication issued in the years 1952 and 1953 were obscene. My brother Judge Henry Schweinhaut merely stated that with that he did not agree, and he found and signed an order on a sole finding of fact that the magazines were not obscene.

It was in that posture that the case went to our Circuit Court of Appeals, and the majority very properly ruled that under Title 39, U.S.C.A. §259 (a), where a postmaster at a local station had indiscriminately withheld money orders and general mail which could touch both a lawful or unlawful purpose or legal or illegal purpose, he had exceeded his bounds, and this Court interprets the majority view as not binding upon whether subesquent issues of the same magazine might be obscene in fact.

The dissenting view of appellate case is strong that all of those magazines were obscene both in law and in fact.

There is also the case of Sunshine Book Co. v. McCaffrey, cited at Sup., 112 N. Y. S. 2d 476, where in passing upon the seizure of the same magazine from the newsstands in New York City in the year 1952, and where it was sought by injunctive powers to lift the ban which the Commissioner of Licenses of New York City had applied, that court held that the same type of magazines—Sunshine & Health and Sun magazine—were obscene, and particularly pointed to the fact that on the front page there was a picture of a nude woman which clearly showed the pubic area. That particular court repudiated the Parmelee case from our own Circuit.

This Court points to the decision in the case of Summerfield v. Sunshine Book Co., No. 12,026 as not controlling on this doctrine of stare decisis.

On the question of res judicata, for the reason that there was no clear showing what the basis was for the finding by the Postmaster that the magazines were obscene nor the

finding by the trial court that they were not obscene, the Court in this particular instance is not bound by the decision in the former case on the doctrine of res judicata. The matter is clearly before the Court for a determination.

The Court has set forth the legal beacon lights that will guide its course in the determination of whether a book, pamphlet, picture, paper, letter, print, or other publication is to be judged, and will make the following findings of fact and conclusions of law as respects the magazine Sunshine & Health, February, 1955, Vol. 23, issue No. 2, and the Sun Magazine, January-February 1955, being volume 5 and issue No. 1.

First and foremost, nudity is not obscene, per se. There are a series of silhouettes which appear in this publication of Sunshine & Health. They depict the human female form in a broad outline. The Court will hold as a fact that they are not obscene.

There are some sketches in the issue of Sun Magazine which are broad pen sketches, and while they reveal the general outline of the female form, the Court will also hold that those sketches, because of their indefiniteness, of failure to emphasize any particular part of the male or female genital area, are not obscene as a matter of fact.

The articles which appear do not contain vulgar or obscene matter, and the Court will hold that they are not obscene as a matter of fact.

The Court will also hold that the American people are a clothed race, that under our Constitution the views of

thers are always permitted, and that progress comes out f some of those views and aids, generally, all the citizens.

The Court will hold that nudism in its present stage is cult or a society or a group that represents a very small inority of the American people.

The Court will also hold that, from acceptance of the najority in works of art, in medical and scientific journals, ooks, magazines and literature, religious articles and the ike, pictures which show the human form merely in the ude and beyond that not revealing the pubic area or the nale or female genitalia, are not obscene.

The Court will also hold as a fact that posterior views of nudes, be they male or female, young or old, whether photographed or sketched at short or long distances, are not obscene as a matter of fact. Views taken from the side of nude persons, male or female, young or old, that do not reveal the genitalia or the pubic area, are not obscene. Where the one photographed or sketched, or whose likeness is reproduced on parchment or paper, or canvas, makes concealment of the pubic area by his or her limbs or by objects, or where the area is concealed by shadow, such pictures are not obscene as a matter of fact. Pictures taken at sufficient distance, although being a front view, are not obscene. It depends upon the distance of the camera's focus or the projection of the artist or the one who is sketching the scene—the distance as projected from the viewer's eye.

Where the artist or the photographer obscures by shadowing, by retouching photographic plates, or by conceal-

ment or obliteration of the pubic area, though it reveals all other formations of the nude body, male or female, young or old, that is not obscene as a matter of fact.

Where children are photographed in a frontal view which reveals the diminutive and undeveloped genitalia, that is not obscene as a matter of fact.

It is difficult to lay down a hard and fast rule but certainly, drawing upon the criminal rule as an analogy, children below the age of seven photographed in such condition do not exhibit a picture which is obscene, lewd, lascivious, filthy, or of an indecent nature, by virtue of their age of innocence, the under-development of their genitalia, and the common acceptance of the American people of such views.

Between the ages of seven and fourteen, when the children undergo rapid development, and especially in the warmer portion of our country, there, of course, because of the development which occurs in the pubic area, which is a small portion of the human anatomy characterized by pubic hair in both sexes, and where genitalia are also intimately revealed, it may or may not, depending upon the distance, the obliteration, the shadowing and the like, be obscene as a matter of fact.

Where photographs are taken of the pubic area at very close range they are as a matter of fact obscene, and, it will follow, as a consequence, as a matter of law, obscene.

As to the female breast there is always the problem of the acceptance of its exposure by the majority of the American people. The organ, of course, is one of nutrition

for young, expanding during periods of pregnancy and reducing in size when the state of non-pregnancy and the nurture of the young child has no longer required its function.

The public is, therefore, accustomed to the view of the nursing mother and has not found it to be indecent or obscene. Since the ancient past there have been many periods of years when, as to the form of dress worn by the female, the plunging neckline has been accepted in the mores of the people, so that the revealing of the breast would not in itself be obscene. However, its accentuation, its distortion, or its grossness could, under the broad definition, depending upon the situation, make it filthy or might make it indecent.

Of course, the Court is not touching upon the question which would appear to be the fact, that sometimes partial concealment adds to allure, because the pictures involved in these cases, where they run against the standards the Court has indicated, are not pictures where there is concealment.

Accordingly, against those broad findings of fact the Court will make these particular findings of fact.

On the outside cover of Sunshine & Health Magazine for February, 1955, there is a close view of a young woman apparently in her early twenties. There is no show of the pubic area and there is no show of the genitalia by the angle at which the picture is shot. While the shadowing on her chest is grotesque and indicates a bosom larger by far than normal, it is shot at such an angle as to elongate and

make quite massive the breast as distinguished from the very small nipple. While it gives an effect, in general, of grotesqueness by the tests which the courts have laid down, it is not obscene under the test of this statute.

There is a picture of a young girl on page 7. She appears to be approximately six or seven. It is a frontal view taken within a very short range of approximately 6 feet. She is swinging on a swing, facing the camera. While the labia majora are shown, they are diminutive and juvenile. One would have to be prudish to hold that that was an obscene picture. The Court does not hold it as a fact and rules that it is a picture that does not contravene this statute.

On page 9 there is a picture of a man on water skiis, taken at some distance. His genitalia are clearly revealed, appearing in the center of the picture. The Court is going to hold that by the closeness, the detail that can be seen, that that is an obscene picture within the purview of the statute.

There is a picture shown at the upper portion of page 13. This is a picture of two persons, a woman seated beside a pool and a man standing to her side. The woman, by the crossing of one leg partly over the other, has obsecured the pubic area and genitalia, and hers is not an obscene picture. The man, on the other hand, is standing with a side view. By artful use of shadow his face is completely obliterated, his entire pubic area is obliterated by the shadow, but prominently shown in front of the pubic area and against this dark background is his male organ; the corona of the penis is clearly discernible; in fact, even

a casual observation of it indicates that the man is circumsized. This obviously has no place even in illustrating the principles of nudism. It is filthy, it is foul, it is obscene, and the Court will hold such as a matter of fact.

On page 15 there are four middle-aged women with their backs to a very large oak tree, appearing to be some 12 feet in diameter. They are holding hands and facing the camera. Only two of these women are revealed to the viewer. The woman to the left is a woman of middle age. She has very large thighs. The pubic hair is clearly shown. Her right thigh is particularly noticeable because, though there are trees nearby, the formation which appears on the thigh is not that of shadow, it appears to be matted varicose veins that cause her to be grotesque, vile, hold her up as an object of scorn, and the Court will hold under the statute that that is filthy, and that it is indecent. That is also true of the woman in the foreground who, while not in as much sunlight as the other, nevertheless clearly reveals her pubic area as she stands within approximately 6 feet of the camera.

On page 16, in a mixed group, there is one man revealed at the corner where his genitals are clearly shown, and the Court will rule as a matter of fact that that is obscene.

On page 29 there is a most unusual picture. Here are two women who appear to be in their late twenties or early thirties. The woman to the left appears to be approximately 5 foot 7. She must weigh in the neighborhood of 250 pounds. She is exceedingly obese.

I assume the illustration, not retouched by the photographer, is to represent the normal, natural person and

reveals her as she was in fact when the picture was taken This picture was taken within approximately 12 feet of the camera. First of all, so far as the demonstration of nudism goes, the picture shows a very clear sunburned "V" at her neck—V-shaped sunburn—whereas the rest of her skin is white as the snow on which she stands. The Court might gather she is a new member or a non-conformist. She has large, elephantine breasts that hang from her shoulder to her waist. They are exceedingly large. The thighs are very obese. She is standing in snow, wearing galoshes. But the part which is offensive, obscene, filthy and indecent is the pubic area shown.

Being most liberal, one might say that the area shown of the pubic hair is caused by shadow, but the same is not to be noticed on both sides. The hair extends outwardly virtually to the hipbone. It looks to the Court like a retouched picture because the hair line instead of being straight is actually scalloped or in a half-moon shape, which makes the woman grotesque, vile, filthy, the representation is dirty, and the Court will hold that that picture is obscene in the sense that it is indecent, it is filthy, and it is obscene as a matter of fact; because of the closeness of the view the woman to her left and the viewer's right is likewise held to be obscene.

The intent of the photographer and publisher is clearly shown by those prior pictures, because on page 17, standing within 8 feet of the photographer, is a male figure. Although the outline of his body is shown, the pubic area and genitalia are completely blocked out, revealing a picture under one condition there, and showing pictures under

different conditions, as pointed out by the Court, and the Court points to that fact and holds that the latter pictures were thus reproduced intentionally.

With regard to Sun Magazine against the standards set forth, the Court will hold that the picture of the young girl photographed on page 6, standing within approximately 6 feet of the camera, showing the pubic area, is obscene; that it is lewd, lascivious, and tends to incite lust and sensual ideas; that the two pictures shown on pages 8 and 9 of a young girl in her early twenties standing within short range of the camera, approximately some 8 to 10 feet, in a frontal view showing the clear detail of the pubic area, are obscene.

On page 11 there is a picture of three females with the caption, "Mrs. Nudism of 1954 and Two of Her Ten Children." The two girls who appear with her are in their early teens. The mother is obese, short, stocky, has large flat breasts; the pubic area is somewhat shaded by shadow; the pubic hair is matted; the over-all picture is one of vulgarity, filth, obscenity and dirt. But the photographer in taking this picture has caused the two girls to turn to a side view and the sunshine clearly shows the fine, soft texture of pubic hair of the adolescent girls, and accordingly the Court finds the picture is obscene, lewd, and lascivious.

There is shown on page 13 a picture of a woman in her early twenties. She is standing in a three-quarter pose within 6 feet of the camera. There is a woman to the side holding a large inflated ball of some sort. The sun and the said ball have cast a shadow upon the body of the other woman. While it is suggestive, it, nevertheless, by the

distance, the posture and the elimination through the shadow of the pubic area, is not obscene.

There is a sketch on page 19 of Sun Magazine which does not show in any great detail the pubic area of the two females shown tossing a large ball, and the Court finds that the drawing is not obscene.

There are pictures taken within an approximate range of 15 feet of the camera, in the surf, showing two nude couples. The women are obscured by the waves. The man in the foreground has completely revealed his male genitalia, and the Court will hold that that is obscene.

There is a suggestive picture on page 23—what appears to be a Mexican, a woman of Mexican birth, a very dark complexioned woman. But the shadows in the scene obliterate the pubic area, and the Court will hold that that is not obscene as a matter of fact or law.

There is a picture taken of a group at some great distance watching an exhibition of judo or wrestling, on page 29, but by virtue of the distance at which that picture is taken the Court will hold that it is not an obscene, lewd or lascivious picture.

Accordingly, the Court concludes as a matter of fact that the pictures fall within the standards as the Court has indicated in its findings, and concludes as a matter of law that the right of the Postmaster to have made his initial findings as he did is established by the cases. The statute does not thwart the principles of the First Amendment or the Fifth Amendment; that there was foundation in fact for his findings, and review of the entire official

record and of the initial decision by the Post Office Examiner, and discloses no erroneous findings of fact nor conclusions of law; the initial decision was founded upon substantial evidence and contains correct rulings, findings of fact and conclusions of law upon all material issues. These magazines contain photographs of naked men, women and children—principally women—clearly revealing genitals, breasts and other portions of the body normally covered in public. It is apparent from advertisements therein contained that they are offered freely for sale to the general public who are not members of the nudist organization. The photographs appear to be obscene and indecent when judged by the ordinary community standards of the vast majority of the citizens of our country.

The postmaster at Mays Landing, New Jersey, will, accordingly, be instructed to treat the February 1955 issue of Sunshine & Health and the January-February issue of Sun (Solaire Universelle Nudisme) as non-mailable.

The Court finds from the record, from the standards, that there was basis in fact and in law for the conclusion of the Postmaster General, and accordingly will sustain him in that view. The Court will conclude as a matter of law that since the dominant theme of both magazines, by the findings of fact, is clearly one of obscenity, the Court will direct first that the motion for a permanent injunction as against the action of the Postmaster General in withholding 400 copies of Sunshine & Health, February, 1955, will be dismissed with prejudice, and disposition of those copies, depending upon an ultimate determination, will

proceed in accordance with postal regulations. On the amended complaint in the third claim seeking a declaratory judgment on Sun Magazine, January-February 1955 issue, the Court will enter judgment for the defendant in the cause and will find as a fact that the magazine is obscene within Title 18 U.S.C. Code 1461.

Counsel will prepare suitable findings of fact and conclusions of law.

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IN THE

Supreme Court of the United States

October Term, 1957

No. 587

SUNSHINE BOOK COMPANY AND SOLAR UNION NATURISME, INC.,

Petitioners,

—against—

ARTHUR E. SUMMERFIELD, Individually and as Postmaster General of the United States,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONERS' REPLY

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PETITIONERS' REPLY

Petitioners wish to reply briefly to contentions in the government's brief in each of the three main headings under which both parties have presented this case.

I.

In one breath the governments asserts that the petitioners do not raise any issue under the First Amendment (Br. 14). But in the next breath the government admits that the petitioners take the position that serious questions under the First Amendment will arise if the instant federal obscenity statute, 18 U. S. C. § 1461, 62 Stat. 768, 69 Stat.

183, is construed as other or more than a criminal statute (Br. 25).

The petitioners' position is plain enough: the instant federal obscenity statute is nothing but a criminal statute; to construe it as more than this would raise serious First Amendment questions (Pet. 20, 24-25); the Court in accordance with its settled practice will not so construe a statute. The petitioners presented this issue in the first subdivision of the first heading of their petition.

The government suggests that under the instant federal obscenity statute the Postmaster General has the power to censor unsealed mail (Br. 17-19). But as Circuit Judge Washington pointed out in his dissenting opinion, in which Chief Judge Edgerton and Circuit Judge Bazelon joined: ". . . In the first place, it is not at all clear that the Post Office Department possesses any power to censor any class of mail, sealed or unsealed. Certainly Congress has never given any such a power in so many words, nor has the Supreme Court ever expressly recognized the existence of such a power. . . ." (Pet App. I, 54-55).

The government characterizes the power of censorship which it claims for the Postmaster General as of "narrow scope" (Br. 26). This is an attempt at the creation of a myth, and a reference to the numerous publications which the Postmaster General has previously sought to exclude from the mails will explode it (see, e.g., Pet. 38). A further reference to the use of the mails by periodicals other than those of petitioners will demonstrate the catastrophic nature of the claimed power. Whereas 25% of the periodical *Sunshine & Health* and 30% of *Sun Magazine* were distributed by means of the mails, in the case of this

country's leading periodicals the situation is just the reverse: in the case of the majority of them, over 70% are distributed through the mails. Figures compiled and published by the Audit Bureau of Circulation reveal that as of December 31, 1956, the last period for which complete figures are available, the paid circulation and subscription circulation (for which the mails are used exclusively) for the country's leading 20 publications which use the mails was as follows:

Magazine	Total Paid Circulation	Mailed	% of Total
1. Reader's Digest	10,718,943	8,578,158	80
2. Life	5,738,226	4,786,573	83.4
3. Ladies' Home Journal	5,320,300	3,615,092	68
4. Saturday Evening Post	4,950,061	3,507,715	70.8
5. McCall's	4,830,102	3,315,899	68.6
6. Better Homes and Gardens	4,302,019	2,921,780	67.9
7. Look	4,191,057	3,353,740	80
8. TV Guide	3,837,511	915,844	23.8
9. Good Housekeeping	3,815,085	2,758,993	72.3
10. American Home	3,150,764	2,415,764	76.6
11. American Legion Magazine	2,741,243	2,741,118	99.9
12. Coronet	2,735,748	1,609,788	58.8
13. Household	2,692,575	2,084,020	77.3
14. True Story	2,688,987	1,230,693	45.7
15. Redbook	2,395,580	1,324,151	55.2
16. True	2,227,483	1,141,893	51.2
17. National Geographic	2,144,704	2,113,304	98.5
18. Time	2,059,536	1,813,463	88
19. Parent's Magazine	1,686,047	1,653,863	98
20. Boys' Life	1,466,041	1,458,227	99

From the standpoint of power over the contents of periodical publications, a cultural commissar could ask for no more than that which the government claims in the instant case for the Postmaster General. And a three week delay in the distribution of any of the above-named periodicals (the three weeks being a minimum period for a hearing by the government's own admission—ft. 13, Br. 23-4) would, for all practical purposes, amount to a destruction of the entire issue of any currently circulated periodical, particularly those circulated on a weekly basis and dealing with current events, since the private express statutes (18 U. S. C. §§ 1694, 1696 and 1697) would prohibit the publishers of those periodicals from utilizing any alternative method of distribution other than the mails during the period of delay caused by a hearing even if an alternative method were practicable.

II.

The government refers to petitioners' motion to the Solicitor of the Post Office Department for leave to introduce evidence on community standards as "ambiguously worded" (Br. 30). The petitioners' motion is entitled: "Motion for Leave to Submit Evidence on Community Standards" (J. A. 57). Its first sentence reads: "Now come the respondents [petitioners] and respectfully ask leave to submit evidence to show that their publications both in illustration as well as in text do not violate community standards" (*Ibid.*). It is difficult to see how the petitioners could have been more precise, particularly in the light of the subsequently decided case of *Roth* v. *United States*, 354 U. S. 476 (1957).

III.

The government challenges petitioners' statement that the Post Office Department in obscenity hearings wants no evidence (Br. 31 n. 16). Unhappily for the government this is the specific position which the Post Office Department took in writing. *Attorney General's Committee On Administrative Procedure, The Post Office Department*, 95-98 (1940). Moreover, the Post Office Department's practice in the instant and other cases bears out petitioners' statement.

In further exculpation of the procedure which the Post Office Department employed in the instant case the government points to the recently published regulations of the Post Office Department (22 F. R. 8999), applicable to obscene publications (Br. 31 n. 16). But these rules and regulations were published only last month—after the petition for a writ of certiorari was filed in this case. Indeed, when counsel for petitioners read about the newly published regulations he speculated whether the instant petition had produced them. The government now concedes that it at least played a part (Br. 31 n. 16). However, this does not alter the fact that at the time of the so-called hearing in the instant case there were no such published rules or regulations; and that in this respect the procedure in the purported hearing violated § 3(a)(2) of the Administrative Procedure Act. 5 U. S. C. § 1002(a)(2), 60 Stat. 238.

The government points proudly to the fact that the Post Office Department's hearing examiner stated that the burden of proof to establish non-mailability rested on the Department. In view of the fact that at a gathering to

determine mailability all evidence is to be excluded save the challenged publications, a statement as to burden of proof is meaningless.

CONCLUSION

The petition for a writ of certiorari in this case should be granted; and the Court should rule that the instant federal obscenity statute with criminal sanctions, 18 U. S .C. § 1461, 62 Stat. 768, 69 Stat. 183, is only a criminal statute, and does not additionally empower the Postmaster General to censor the contents of any class of mail sealed or unsealed.

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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 587

SUNSHINE BOOK COMPANY AND SOLAR UNION NATURISME, INC., PETITIONERS

v.

ARTHUR E. SUMMERFIELD, INDIVIDUALLY AND AS POSTMASTER GENERAL OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the District of Columbia (Pet. App. 73–94) is reported at 128 F. Supp. 564. The opinions of the United States Court of Appeals for the District of Columbia Circuit (Pet. App. 41–72) are not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on October 3, 1957 (Pet. App. 41). The petition for a writ of certiorari was filed on October 30, 1957. On October 18, 1957, the Court of Appeals granted

a stay of its mandate pending the filing of a petition for a writ of certiorari in this Court. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the Postmaster General has statutory power to exclude obscene matter from the mails.

2. Whether the determination by the Post Office Department that petitioners' publications were obscene and therefore nonmailable, which was reviewed and affirmed by the District Court and by the Court of Appeals for the District of Columbia sitting *en banc,* accorded with the standard for obscenity reiterated in *Roth* v. *United States,* 354 U. S. 476.

3. Whether the hearing held by the Post Office Department was a fair hearing which accorded petitioners due process of law.

STATUTE AND REGULATION INVOLVED

1. 18 U. S. C. 1461 provided, in pertinent part: [1]

> "Every obscene, lewd, lascivious, or filthy book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character;
>
> * * * * *

[1] The statute as set forth above was in force on January 28, 1955, when the Post Office Department entered its final order declaring petitioners' publications to be nonmailable. On June 28, 1955, it was amended to substitute "indecent, filthy or vile article, matter, thing, device or substance" for "or filthy book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character." 69 Stat. 183.

> Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.
>
> Whoever knowingly deposits for mailing or delivery, anything declared by this section to be nonmailable, or knowingly takes the same from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

2. The regulation involved is 39 C. F. R. (1949 ed.) 36.2,[2] which is in the words of 18 U. S. C. 1461, *supra*.

STATEMENT

This is an action by two closely-affiliated nudist organizations to compel the Postmaster General to accept for mailing, as third class matter, the February 1955 number of "Sunshine and Health" magazine and the January-February 1955 number of "Solaire Universelle Nudisme" magazine, known as "Sun" magazine. These issues were excluded from the mails after an administrative hearing and appeal in which the Post Office Department found that certain pictures in the magazines were obscene, and that, accordingly, the magazines were nonmailable.

Sunshine Book Company and Solar Union Naturisme Inc. are nonprofit New Jersey corporations which publish these two magazines advocating nudism (J. A. 21-23)[2a] Sunshine Book's magazine

[2] This section, as amended, appears in the 1955 revision as 39 C. F. R. 14.3.

[2a] "J. A." is used to refer to the printed joint appendix, used in the court below and filed in this Court as part of the record, and to the pages, consecutively numbered, added to the joint appendix as part of the record in this Court.

"Sunshine and Health" is published monthly; Solar Union's periodical, "Solaire Universelle Nudisme", is bi-monthly (J. A. 21–23). Ilsley Boone is an editor and principal officer of both corporations (J. A. 9, 14, 19, 39).

1. *Pre-Hearing Proceedings in the Post Office Department.*—The dispute from which the present suit arose began after the printing of the February 1955 issue of "Sunshine and Health" was completed in December 1954. Between December 24 and December 31 of that year, petitioner Sunshine Book Company submitted 400 copies of "Sunshine and Health" to the Postmaster at May's Landing, New Jersey, for mailing as third class matter (J. A. 2, 4, 5–6). The Postmaster was in doubt as to the mailability of the magazine because some of its pictures appeared to be obscene. He therefore submitted a sample copy to the Solicitor of the Post Office Department for a ruling on mailability (J. A. 74). The Solicitor advised him that the copies of the magazine "which are subject to inspection" should be withheld from dispatch, but cautioned him against detaining any copies which were to be handled under seal as first-class matter. The Postmaster was further instructed to notify the petitioner to show cause within 15 days why the magazine should not be treated as nonmailable matter under 39 C. F. R. (1949 ed.) 36.2, *supra*, p. 3 (J. A. 74).

By a letter dated December 31, 1954, the Postmaster communicated the offer of a prompt hearing to Sunshine Book. But he erroneously stated that the Solicitor had determined the magazine to be non-

mailable and that it was to be withheld from dispatch (J. A. 75).

On January 5, 1955, counsel for the petitioner, accompanied by Mr. Boone, conferred in Washington with attorneys from the Post Office Department and asked that the Postmaster General "recede from the position he had taken" (J. A. 14). The following day, petitioners' counsel was given a formal Notice of Hearing making clear that the Postmaster General had taken no position except one of doubt as to the mailability of "Sunshine and Health". This notice expressly stated that no ruling of mailability or nonmailability had yet been made by the Post Office Department. The hearing was set for January 10, 1955, in the Post Office Department at Washington, and petitioner Sunshine Book was informed that the Hearing Examiner's initial decision was subject to appeal to the Solicitor, who would make the final decision for the department (J. A. 41).[1]

On the same day, January 6, 1955, a similar Notice of Hearing was sent to "Solaire Universelle Nudisme" magazine, setting a hearing on the mailability of the January-February issue of that maga-

[1] Petitioners' "Statement of the Case" implies that officials of the Post Office Department, in the performance of their duty to consider petitioners' arguments, held out a "lure" to it which was abruptly withdrawn when the Notice of Hearing was served (Pet. 11). This and other colored descriptions of the negotiations between the parties, as well as other animadversions in the petition against the Post Office Department, are without the slightest support or justification, and we wish to emphasize that the Post Office Department—and the courts below—gave full and fair consideration to petitioners' views.

zine for January 11, 1955, in Washington (J. A. 32, 42).

2. *Denial of Temporary Restraining Order.*—On the same day that it received the Notice of Hearing, January 6, 1955, Sunshine Book filed a verified complaint in the District Court for the District of Columbia (J. A. 2), and moved for a temporary restraining order (J. A. 3), as well as preliminary and permanent injunctions (J. A. 13), to prevent the postal officials from taking any action to withhold the February 1955 issue of "Sunshine and Health" from dispatch. The motion for a temporary restraining order was denied by the District Court (Kirkland, J.) after an appearance before it on January 7, 1955; the court also refused to direct the Post Office Department to postpone its hearing (J. A. 17–18).

3. *The Administrative Hearing.*—In a supplemental affidavit in support of the motion for a temporary restraining order, Mr. Boone deposed that the February 1955 issue of "Sunshine and Health" would be "dead" before a final administrative determination (J. A. 14). Nevertheless, when Sunshine Book was unsuccessful in obtaining an order from the District Court postponing the administrative hearing, counsel for petitioners requested that both hearings be postponed until January 13, and 14, 1955; upon the further request of petitioner, the hearings were postponed until January 17, 1955 (J. A. 17–18, 70, 71).

On January 17, 1955, the scheduled administrative hearing took place before James C. Haynes, a Hearing Examiner. By agreement of counsel, the hearings for both "Sunshine and Health" and "Solaire Uni-

verselle" were consolidated. At the outset of the hearing, Examiner Haynes stated his understanding that "mailability" proceedings were "governed by no published rules of practice or procedure" of which he was aware. But he made clear that the burden of proof to establish non-mailability rested upon the Post Office Department. He further pointed out that his initial decision was subject to appeal to the Solicitor of the Post Office Department under the terms of the Notice of Hearing (J. A. 78).

Counsel for the Post Office Department offered in evidence a copy of the February 1955 issue of "Sunshine and Health" and a copy of the January-February 1955 issue of "Sun Magazine" (J. A. 80).

In response to arguments from counsel for petitioners, the examiner ruled that he did not have authority to determine whether the Postmaster General had legal power to withhold the magazines from dispatch; the only issue he could consider was the factual question of whether or not the magazines contained obscene matter (J. A. 80–81).

Petitioners then offered in evidence a Joint Appendix containing the record of a prior suit by Sunshine Book against the Postmaster General (J. A. 83). Although the president of Sunshine Book (Ilsley Boone) has conceded that the February 1955 issue of "Sunshine and Health" contained different pictures and text from the magazines involved in the prior litigation (J. A. 10), petitioners urged that the matters contained in that Joint Appendix should be received to show that the current proceedings were barred by *res judicata* and *stare decisis*. The representatives of

the Post Office Department objected to the admission into evidence of the affidavits contained in the Joint Appendix, on the ground that they would have no opportunity to cross examine the affiants (J. A. 83). After argument, the examiner admitted the Joint Appendix on the issues of *res judicata* and *stare decisis* but ruled that he would give no evidentiary weight to the affidavits (J. A. 90).

Petitioners next offered extracts from the record in a previous administrative proceeding. These extracts contained the testimony of three psychiatrists, Drs. Ralph Banay, Frederick Wertham, and J. G. Cushing, on the contents of 1948 numbers of "Sunshine and Health" (J. A. 93–94). Again, the representatives of the Post Office Department objected on the ground that they would have no opportunity to cross examine, and that recorded testimony taken many years before would not bear upon the mailability of the two particular numbers before the examiner (J. A. 94). Upon this ground, the Post Office Department's objection was sustained.

Petitioners did not offer any other evidence bearing on the obscenity of the matters in issue before the examiner. After the offer of recorded testimony from the prior proceedings was rejected, petitioners' counsel stated that he had nothing further (J. A. 96).

4. *Ruling by the Hearing Examiner.*—The initial decision and recommendations of the Hearing Examiner was issued on January 20, 1955 (J. A. 61–69). In an extensive opinion, he described in detail the contents of the pictures contained in the magazines. The

February 1955 issue of "Sunshine and Health" was found to be as follows (J. A. 63–64):

> The front cover displays a full-page photograph in color of an entirely nude, young, attractive and shapely woman. On the inside of the front cover is another large photograph of a woman whose upper body and breasts are nude. On the rear cover there appears a large photograph of naked women and a naked man. The inside pages of the magazine contain some 15 photographs of naked men, women and children, singly and in groups. Details of naked buttocks, female breasts and pubic areas, and male genitalia are clearly revealed in some of them. * * *

The January-February 1955 issue of "Sun Magazine" was described in these terms (J. A. 64):

> On the front cover and on the inside of the front cover are large photographs of two naked women, the former being in natural color. The rear cover displays a photograph of two naked women in a rubber raft floating on the water. Within the pages of the magazine are found some 25 or 26 photographs of naked men, women and children, shown singly and in groups. In some of these female breats [sic] and pubes and male genitalia are clearly revealed. * * *

To the illustrations thus described the Hearing Examiner applied the following legal standard (J. A. 64–65):

> The test evolved and commonly applied by the Courts in determining whether a publication is obscene, lewd, lascivious and indecent is whether the publication, taken as a whole, would have a libidinous effect on the average person. In so determining, the publication must

be considered as a whole, in its effect, not upon any particular class but upon all those whom it is likely to reach (*Parmelee* v. *U. S.*, 113 F. (2d) 729, U. S. C. A., D. C., dec. May 14, 1940). It is the "effect of a publication on the ordinary reader" that counts. The dominant effect of an entire publication determines its character and "obscene" indicates the present critical point in the compromise between candor and shame at whch [sic] the community may have arrived here and now (*Walker* v. *Popenoe*, 149 F. (2d) 511, U. S. C. A., D. C., dec. May 28, 1945; *Parmelee* v. *U. S.*, *supra*; *U. S.* v. *Kennerly*, 209 F. 119).

Under these principles, the Hearing Examiner ruled (J. A. 66):

> The right to practice nudism and to advocate its practices by any lawful means is not in issue here. But in the course of such advocacy the display of unadorned nakedness to the public generally is surely offensive to presently prevailing American standards of decency and modesty. The fact that the photographs in these magazines may illustrate nudist life and activities and are accompanied by relevant textual matter upon the subject does not in any way tend to lessen the erotic impact of the photographs themselves upon the mind of the ordinary person. For these reasons I regard the two issues of "Sunshine & Health" and "Sun Magazine" in evidence as obscene, lewd, lascivious and indecent (cf. *Sunshine Book Co.* v. *McCaffrey*, 112 N. Y. S. (2d) 476, Supreme Court, Special Term, N. Y. County, Part III, dec. April 25, 1952).

Upon this basis, the Examiner recommended that the February 1955 issue of "Sunshine and Health", and the January-February 1955 issue of "Sun Magazine" be declared nonmailable (J. A. 69). This decision was appealed by petitioners to the Solicitor of the Post Office Department who affirmed it in a brief opinion dated January 28, 1955 (J. A. 44–45).

5. *Proceedings in the District Court.*—Three days later, on January 31, 1955, petitioners' motion for a permanent injunction came on for hearing in the District Court (J. A. 97). A certified copy of the administrative proceedings and rulings was admitted into the record (J. A. 98). Petitioners challenged the Post Office Department ruling on four grounds: (1) that 18 U. S. C. 1461, *supra*, pp. 2–3, does not authorize the exclusion of nonmailable matter from the mails; (2) that, if it does authorize such exclusion, it is invalid under the First Amendment: (3) that the administrative hearing before the Post Office Department was unfair; and (4) that the publications involved were not obscene (J. A. 101–102). The court ruled that it would consider the issue of obscenity *de novo* (J. A. 105), and offered to receive testimony (J. A. 102). Counsel for petitioners offered the testimony of two witnesses—Dr. Albert Ellis, a psychologist, and Mr. Eugene Thye, an art historian. This testimony had not been offered before the Hearing Examiner but counsel for petitioner represented that it had been offered to the Solicitor (J. A. 109–110).*

*A motion for leave to submit evidence on community standards was filed with the Post Office Department on January 24, 1955, one week after the hearing before the examiner, and four

It developed that neither of these witnesses was present in the courtroom prepared to testify. The court reiterated its willingness to hear the testimony of witnesses touching the obscenity of the particular photographs before it (J. A. 111). Counsel for petitioners then made an offer of proof *as if* the witnesses were present and prepared to testify, by summarizing the testimony they would give. This summary indicated that the witnesses, if present, would give their opinions as to American attitudes toward nudism in American life and art (J. A. 112–115). The court ruled that the issue before it was obscenity, not the propriety of nudism, and that the summarized testimony was not relevant to the obscenity or non-obscenity of the pictures in the particular magazines before it (J. A. 115–116).

The District Court held that the action of the Post Office Department in excluding the two publications from the mails was authorized by 18 U. S. C. 1461; that the statute as so construed was not unconstitutional; that the Post Office Department's finding that the two numbers were obscene was supported by substantial evidence; and that, as independently determined by the court, the two magazines were in fact obscene (J. A. 117–135). This ruling was embodied in formal findings and conclusions (J. A. 135–139), and the amended complaint was dismissed (J. A. 139).

6. *Proceedings in the Court of Appeals.*—Petitioners appealed to the Court of Appeals for the District

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days after his initial decision and recommendations. Neither the motion nor the brief in support of it referred to the witnesses which petitioners proffered in the District Court (J. A. 57–59).

of Columbia Circuit (J. A. 140). A division of that court, in an opinion by Washington, C. J., reversed the judgment of the District Court on the ground that the order of the Post Office Department was "invalid" (Pet. App. 62–68). The opinion held that improper standards had been applied in making the determination of obscenity; and, further, that 18 U. S. C. 1461 "contains no language which can be construed to permit the Department to refuse to transport and deliver newspapers and magazines pending final decision on its part as to whether their content is acceptable to it" (Pet. App. 67). Judge Danaher dissented from both grounds (Pet. App. 68–72).

The Government then moved for, and was granted, a rehearing by the court sitting *en banc* (J. A. 167; Pet. App. 44). Reargument was heard by eight judges on September 25, 1956,[5] but because of the pendency in this Court of several important cases bearing on the issues raised by the appeal,[6] the Court of Appeals postponed decision until October 3, 1957 (Pet. App. 44). The court *en banc* took a position contrary to the earlier determination by the three-judge division, and affirmed the judgment of the District Court. The judgment of the court was announced by Circuit Judge Danaher in an opinion joined by Prettyman, Wilbur K. Miller and Bastian, C. JJ. Circuit Judge Fahy concurred separately.

[5] Circuit Judge Burger was Assistant Attorney General in charge of the Civil Division of the Department of Justice at the time the suit was filed, and so took no part in the consideration or hearing of the case (Pet. App. 41).

[6] *Roth* v. *United States*, 354 U. S. 476; *Alberts* v. *California*, 354 U. S. 476; *Kingsley Books, Inc.* v. *Brown*, 354 U. S. 436.

Circuit Judge Washington, joined by Chief Judge Edgerton and Circuit Judge Bazelon, dissented.

ARGUMENT

In the questions they specify for review (Pet 2–3), petitioners do not raise any issue under the First Amendment, nor are they in a position to claim that Amendment's protection for obscene matter contained in the two issues of their magazines here involved. *Roth* v. *United States*, 354 U. S. 476; *Kingsley Books, Inc.*, v. *Brown*, 354 U. S. 436.[1] They limit their request for review to the questions whether 18 U. S. C. 1461 permits the Postmaster General to exclude nonmailable obscenity from the mails; whether the administrative decision and the decision of the reviewing courts were in accord with the standards for determining obscenity set forth in *Roth* v. *United States, supra;* and whether their hearing before the Post Office Department granted them due process of law.

These questions do not merit review here, upon this particular record. First, the statute and its predecessors have, for more than 80 years, been uniformly construed by the courts, Congress, and the Post Office Department to permit administrative exclusion of obscenity from the mails; this necessarily

[1] Although petitioners attacked the Postmaster General's order and regulation under the First and Fifth Amendments (J. A. 37), their amended complaint did not challenge the constitutionality of 18 U. S. C. 1461 (J. A. 21–38). Accordingly, the constitutionality of the statute is not open to attack by them here. It should be noted that, had petitioners challenged the constitutionality of the statute in the District Court, a problem as to convening a three-judge court would have arisen. See 28 U. S. C. 2282.

includes power to delay dispatch of suspect matter for a brief period until a determination of mailability can be made. Second, the principles underlying this Court's decision in *Roth* were clearly and correctly applied by the Post Office Department and the reviewing tribunals. Finally, there is no occasion to hear petitioners' procedural complaints since this record shows that they were prepared to offer no testimony or other evidence relevant to the obscenity of the specific materials before the Post Office Department.

I.

1. (*a*). Congress has specifically empowered the Postmaster General to withhold matter he finds to be obscene from admittance to the mails. The statute provides in plain terms that "[e]very obscene, lewd, lascivious, or filthy book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character * * * [*i*]*s declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.*" 18 U. S. C. 1461 (emphasis added). This is an express direction which cannot be ignored; obscene matter is not to be carried through the mails.

Comparable declarations of nonmailability, and the accompanying prohibition against conveyance in the mails and delivery by post offices and carriers, appear as part of a regular pattern for excluding from the mails matter which Congress has also made it a crime to mail. Explosives, poisons, disease germs, and intoxicating liquors are nonmailable (18 U. S. C.

1716); so are writings advocating treason, insurrection, or forcible resistance to the law (18 U. S. C. 1717); writings inciting to arson, murder, or assassination (18 U. S. C. 1461); concealable firearms (18 U. S. C. 1715); foreign divorce information (18 U. S. C. 1714); and contraceptive and abortive materials or information concerning their use (18 U. S. C. 1461). It cannot be argued that the unequivocal declaration of the nonmailability of such things as explosives nevertheless permits them to be circulated in the mails until a criminal conviction has been obtained, and there is no reason for construing the nonmailability provision differently for obscenity than for the other matters declared to be nonmailable. "The scope of the Postmaster General's alleged authority is confessedly the same whether the reason for the nonmailable quality of the matter inserted in a newspaper is that it violates the Espionage Act, or the copyright laws, or that it is part of a scheme to defraud, or concerns lotteries, or is indecent, or is in any other respect matter which Congress has declared shall not be admitted to the mails." (Brandeis, J., dissenting in *Milwaukee Publising Co.* v. *Burleson*, 255 U. S. 407, 418.) If matter is nonmailable, then, it must be excluded from the mails under the terms of the congressional command; if there is doubt as to its mailability, it may be withheld from dispatch until a decision on mailability is had, with due regard for both the mandate of Congress and the procedural rights of the sender.

(*b*). The legislative history supports and reinforces the view that it was the intent of Congress that the

Postmaster General should exclude nonmailable obscenity from the mails. The first statutory prohibition against admission of obscenity to the mails was Section 16 of the Act of March 3, 1865, 13 Stat. 507:

> SEC. 16. * * * *no obscene book, pamphlet, picture, print, or other publication of a vulgar and indecent character, shall be admitted into the mails of the United States;* any person or persons who shall deposit or cause to be deposited, in any post-office or branch post-office of the United States, for mailing or for delivery, an obscene book, pamphlet, picture, print, or other publication, knowing the same to be of a vulgar and indecent character, shall be deemed guilty of a misdemeanor * * * [emphasis added].

Since the criminal offense was defined completely in the clause beginning "any person * * *," the italicized language would have been superfluous if only a criminal statute were intended.

Moreover, the debates in the Senate show that in fact Congress designed the first clause to confer power on the Postmaster General to exclude obscenity from the mail. As reported in the Senate, the bill included the language quoted above and an additional clause, following the clause denying admission of obscenity to the mails, which provided "but all such obscene publications deposited in or received at any post office, or discovered in the mails, shall be seized and destroyed, or otherwise disposed of, as the Postmaster General shall direct" (Cong. Globe, 38th Cong., 2d Sess., 661). Senator Reverdy Johnson of Maryland feared that the bill as reported would lead to the mailing of obscene matter in sealed envelopes,

and that "the postmaster, whenever he suspects that the envelope contains anything which is obnoxious to objection [sic], will break the seal." He therefore moved to strike all the language of the bill except that defining the criminal offense. In response to this motion, Senator John Sherman of Ohio argued that "the legislative prohibition against carrying such matter *when it is known to the postmasters should be left.* Probably the second clause allowing him to open mail matter should be struck out * * *" (emphasis added). Senator Johnson thereupon modified his amendment to conform with Senator Sherman's suggestion, so that the bill as finally enacted permitted postmasters to refuse obscene matter admittance to the mails. (*Id.*)

In 1873, the duty thus imposed on postmasters not to admit obscene matter to the mails was supplemented by a statute making it a criminal offense for any Government employee knowingly to aid or abet the sending or receiving of obscene matter. Act of March 3, 1873, 17 Stat. 599, R. S. 1785, repealed in 35 Stat. 1153 (1909). Three years later, Congress revised the formula of the 1865 Act from a mandate that obscenity "shall [not] be admitted to the mails" to: "Every obscene, lewd, or lascivious book, pamphlet, picture * * * [etc.] are hereby declared to be non-mailable matter, and shall not be conveyed in the mails, nor delivered from any post-office nor by any letter-carrier." Act of July 12, 1876, 19 Stat. 90. This has remained the basic command of the statute down to the present day.

The statutory prohibition against conveyance of obscenity through the mails was again strengthened

in 1879 so that nonmailable matter could be stopped even if it reached the office of delivery. Act of March 3, 1879, 20 Stat. 360. This statute, dealing in part with fourth class matter, today reads (39 U. S. C. 243):

> * * * All matter declared nonmailable by Section 334 of Title 18 [now 18 U. S. C. 1461], which shall reach the office of delivery shall be held by the postmaster at the said office subject to the order of the Postmaster General.

Thus, between 1865 and 1880, Congress developed a comprehensive statutory scheme for the exclusion from the mails of obscene matter whenever it was discovered by the Post Office Department.

(*c*). The Post Office Department has implemented this mandate of Congress by an administrative practice which has been in force for more than 80 years. The earliest postal regulations placed the burden of excluding obscenity and other nonmailable matter upon the local postmaster. See, *e. g.*, Postal Laws and Regulations, 1873 ed., Reg. Section 88[8]; Postal Laws and Regulations, 1887 ed., Section 527[9]; Postal Laws

[8] Section 88. "All books, pamphlets, circulars, prints, &c., of an obscene, vulgar, or indecent character; * * * must be withdrawn from the mails by postmasters at either the office of mailing or the office of delivery."

[9] Section 527. "Postmasters are required to exclude from the mails all unmailable matter; but they are specially warned that they have no right to detain first class matter upon the mere suspicion that it contains anything forbidden to be sent in the mails.

"When matter manifestly obscene, or circulars concerning lotteries, are deposited for mailing, the postmaster should withdraw them, and send them with a full statement of the facts within his knowledge to the dead letter office."

and Regulations, 1893 ed., Section 335"; 1 Ops. Asst. Atty. Gen. for the Post Office Dept. 41 (1873); 4 Ops. Asst. Atty. Gen. for the Post Office Dept. 389, 391 (1907). In 1902, however, postmasters were instructed not to give opinions on the mailability of obscene matter, but to refer such questions to the First Assistant Postmaster General for instructions. Postal Laws and Regulations, 1902 ed., Section 497. Postmasters continued to be responsible in the first instance for excluding obscenity offered for dispatch. Postal Laws and Regulations, 1902 ed., Section 573.

The principles governing the administrative practice, and the historical distinction between the administrative and criminal sanctions established by Congress, were summarized in an opinion issued by the legal advisor of the Post Office Department in 1908 (4 Ops. Asst. Atty. Gen. for Post Office Dept. 741, 742):

> By the terms of [R. S.] 3893, however, it rests with the Post-Office Department to determine whether in a given case the matter offered for transmission is mailable or the contrary. If unmailable, it must be withheld from transmission; and it is evidently not contemplated by the statute that such action shall be postponed until the question whether or not the matter is legally transmissible shall be passed upon by the courts. The action taken by the Post-Office Department in refusing to transmit matter which it holds to be unmailable under the statute is entirely separate and apart from

[10] Section 335. "Postmasters are responsible for admission of improper matter, and will exercise great care to exclude whatever is manifestly unmailable."

> any criminal proceedings which may be instituted against the person depositing such matter in the mails. * * *

This interpretation has been consistently followed by the Post Office Department under the various amendments and revisions of the basic prohibition against conveyance of obscene matter in the mails.[11] That this administrative practice accords with the aim of Congress has been recognized in debate on the floor of the House, *e. g.*, 8 Cong. Rec. 697, in hearings before committees of Congress, *e. g.*, Hearings Before the Committee on Post Office and Civil Service, House of Representatives, 83rd Cong., 2d Sess., on H. R. 569, pp. 32–33, and in committee reports, *e. g.*, Sen. Rep. No. 747, 52nd Cong., 1st Sess.

The latter report reflects the care with which Congress has considered the matter. It concerns a bill (S. 2834, 52nd Cong.) which would have given the Postmaster General the power to declare nonmailable future issues of publications which regularly contain obscenity. The Senate Post Office and Post Roads Committee reported the bill unfavorably, noting that then-existing law, from which the present 18 U. S. C. 1461 is derived, already permitted the Postmaster

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[11] The 1865 statute, 13 Stat. 504, 507, was reincorporated into Section 148 of the revised postal laws of 1872. 17 Stat. 302. In 1873, Section 148 was amended, 17 Stat. 599, and the same year was incorporated into Title XLVI (The Postal Service) of the Revised Statutes, as Section 3893. R. S. 3893 was amended in 1876, 19 Stat. 90, and again in 1888, 25 Stat. 187. In 1909, it became Section 211 of the revised criminal code, 35 Stat. 1129, 1138. It was reenacted as Section 1461 of the criminal code in 1948, 62 Stat. 768, and amended again in 1955, 69 Stat. 183.

General to exclude obscene matter from the mails. The committee had reservations about the desirability of permitting the Postmaster General to exercise such power, but it noted (Sen. Rep. No. 747, 52nd Cong., 1st Sess., p. 3):

> * * * whatever may be the doubt as to the propriety, to say nothing as to the constitutionality, of clothing the Postmaster-General with this sole power, Congress has already done it in existing legislation in reference to all obscene, lewd, and lascivious books, pamphlets, pictures, papers, letters, writings, prints, or other publications of an indecent character. * * *

(*d*). The terms of the statute and its history, together with this long settled administrative practice and the aquiescence of Congress in that practice, make it undisputable that the Postmaster General has the statutory power to exclude obscene matter from the mails. See *Lewis Publishing Co.* v. *Morgan*, 229 U. S. 296, 305. But there is also very substantial judicial precedent. In *Milwaukee Publishing Co.* v. *Burleson*, 255 U. S. 407, this Court upheld the Postmaster General's decision to revoke the second class mailing privilege of a newspaper which he thought had violated the Espionage Act of 1917 by publishing nonmailable propaganda. In so ruling, the Court noted that the Postmaster General could have excluded the paper entirely, as nonmailable matter. 255 U. S. 407, 416. Mr. Justice Brandeis, while dissenting from the decision, also recognized this general practice (255 U. S. 407, 421):

> As a matter of administration the Postmaster General, through his subordinates, rejects mat-

ter offered for mailing, or removes matter already in the mail, which in his judgment is unmailable. The existence in the Postmaster General of the power to do this cannot be doubted. The only question which can arise is whether in the individual case the power has been illegally exercised." * * *

2. This duty imposed by 18 U. S. C. 1461 upon the Postmaster General to exclude obscene matter from the mails is not an abstract exhortation. It is a declaration of postal policy firmly coupled with a command that affirmative action be taken to bar obscenity from the mails. Cf. 5 U. S. C. 369. The Postmaster General, through his subordinates, must decide in any given case whether material subject to postal inspection is within any class of matter declared by Congress to be nonmailable. And the obligation to make such a decision necessarily includes authority to withhold doubtful matter from dispatch for a reasonable time until a decision can be rendered as to its mailability.[13] Obscenity is not different in

[12] See also, *e. g.*, *Roth* v. *Goldman*, 172 F. 2d 788 (C. A. 2), certiorari denied, 337 U. S. 938 (obscenity); *Gitlow* v. *Kiely*, 44 F. 2d 227 (S. D. N. Y.), affirmed, 49 F. 2d 1077 (C. A. 2) (inciting to revolution); *Burleson* v. *United States ex rel. Working Man's Co-op. Publishing Ass'n.*, 274 Fed. 749 (C. A. D. C.) (inciting to revolution); *Masses Publishing Co.* v. *Patten*, 246 Fed. 24 (C. A. 2) (violation of Espionage Act); *Anderson* v. *Patten*, 247 Fed. 382 (S. D. N. Y.) (obscenity). Cf. *One, Inc.* v. *Olesen*, 241 F. 2d 772 (C. A. 9), now pending on petition for certiorari, No. 290, this Term.

[13] There is no basis for any suggestion that undue delay can be attributed to the Post Office Department in this case. The total proceeding, from notice to final decision, took little more than three weeks, with part of that period accounted for by an extention granted at the request of counsel for petitioners. See

this respect from any other form of nonmailable matter. The dissenting judges below ignored this fact. They would construe the statute as if nonmailable matter were entitled to instantaneous dispatch, even though this would result in complete frustration of the policy laid down by Congress. Their views were apparently founded upon the erroneous belief that Congress had not authorized administrative exclusion of obscenity and other nonmailable matters.[14] But, as the majority correctly recognized and as we have shown, Congress has given the Postmaster General the necessary powers to implement its command, including power to permit a brief delay in dispatch while a determination of mailability is made.

We do not contend that such a decision would be valid if it was unreasonably delayed or if it was finally made without having given the sender the same opportunity for a hearing which petitioner has had. Cf. *Walker* v. *Popenoe,* 149 F. 2d 511 (C. A. D. C.). (The Post Office Department has recently adopted regulations to assure expeditious decision in "nonmailable" proceedings, 22 F. R. 8999.) But we submit that

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pp. 5–11, *supra.* It is unlikely that any administrative hearing of this or any other type could be noticed, heard, and decided in a shorter time than elapsed here.

[14] The minority below also relied upon the concurring opinion in *Walker* v. *Popenoe,* 149 F. 2d 511 (C. A. D. C.). In that case, unlike this one, the Postmaster General, without any notice or hearing, barred an educational pamphlet called "Preparing for Marriage" from the mails. The Court of Appeals held that the pamphlet was not obscene and, as an alternative ground, that failure to accord any hearing was a denial of due process. The question of whether a brief delay in dispatching the pamphlet prior to a fair hearing would have satisfied due process was not before the court.

18 U. S. C. 1461 cannot be construed without reference to the practicalities of postal administration which were considered by Congress when it conferred power to exclude nonmailable materials. See pp. 17–19, *supra*. To deny the Post Office Department the power to withhold doubtful matter from the mail until a decision on mailability had been rendered would render the nonmailability portion of the statute unenforceable. The barn could never be locked until after the horses were gone. Familiar principles of statutory construction forbid such an emasculation of a part of the statute which Congress deliberately inserted and has ever since maintained and strengthened. See, *e. g.*, *United States* v. *Menasche*, 348 U. S. 528, 539.

3. Petitioners contend that serious questions under the First Amendment will arise unless this statute is construed so as to render it ineffective. Their petition, however, does not raise these questions, and in any case, even in construing a statute narrowly to avoid constitutional doubts, the courts "must also avoid a construction that would seriously impair the effectiveness of the Act in coping with the problem it was designed to alleviate". *United States* v. *Harriss*, 347 U. S. 612, 623. Also, we doubt that any serious First Amendment issue can arise out of Congress' clear direction that the Postmaster General should exclude obscene matter from the mail, so long as that mandate is fairly and expeditiously followed. Obscenity is not protected by the Constitution in state criminal proceedings (*Alberts* v. *California*, 354 U. S. 476), federal prosecutions for de-

positing it in the mails (*Roth* v. *United States*, 354 U. S. 476), or in state civil injunction proceedings to restrain its sale. *Kingsley Books, Inc.* v. *Brown*, 354 U. S. 436. It should not be treated differently in federal administrative proceedings subject to review on the record in the federal courts. Certainly, one who distributes obscenity through the mail has no greater rights under the First Amendment than one who uses the mails to conduct a fraudulent enterprise. *Donaldson* v. *Read Magazine*, 333 U. S. 178; *Public Clearing House* v. *Coyne*, 194 U. S. 497.

The mode of procedure used to determine what is and what is not obscene does not affect substantive rights under the First Amendment so long as it accords traditional standards of fairness. There is no constitutional requirement that the factual issue of obscenity be resolved by a jury. *Kingsley Books, Inc.* v. *Brown*, *supra*. And this Court has declined to rule that the First Amendment may have a different significance where obscenity is distributed through the federal mails than where it is distributed on a local basis. *Roth* v. *United States*, *supra*. Thus, the administrative power involved here, restricted as it is to particular items which may still be distributed outside the mails, does not raise any First Amendment issue requiring the excessively limited and belated interpretation of 18 U. S. C. 1461 which petitioners ask this Court now to consider.

Nor need there be any fear that the Post Office Department will be able to set itself up as a national cultural arbiter. Within the narrow scope of its authority to exclude obscenity from the mails, it is

obliged to apply contemporary community standards. On occasion, as with all human institutions, it may err in its application of this standard. If it does err, the courts stand ready to correct it. See, *e. g., Walker v. Popenoe,* 149 F. 2d 511 (C. A. D. C.). The familiar process of administrative decision and judicial review will piece out and reflect the obscenity standards of the community, which is, in the last analysis, the only cultural arbiter governing petitioners' publications and similar material.

II

The standard of obscenity applied by the Post Office Department and the courts below accorded with the criterion reiterated by this Court in *Roth* v. *United States,* 354 U. S. 476, and there is no need for this Court to review the concurrent findings made below with respect to the particular magazines here involved.

1. Little purpose would be served by re-analyzing the Hearing Examiner's opinion (see *supra,* pp. 8–10). He reviewed the pictures contained in petitioners' magazines in a manner entirely consistent with the reasoning in *Roth.* In fact, petitioners do not complain of the test invoked. Instead, they insist that it was incorrectly applied to their publications because the magazines were not considered as a whole. But the controlling fact is that the items found to be obscene were pictures. Many of these are unretouched photographs which plainly display, sometimes in offensive postures, male and female sexual organs. These pictures, in and of themselves, constitute independent obscene items. The text of

petitioners' magazines advocating nudism is innocuous, but, as the Hearing Examiner pointed out (*supra*, p. 10), the Post Office Department is not concerned with petitioners' advocacy of nudism. As the law requires, it is concerned only with whether petitioners are using the mails to distribute obscenity.

Photographs of the naked human body, particularly photographs displaying certain portions of the anatomy, have a psychosexual force of their own, quite apart from any accompanying textual material. Occasionally, an innocent picture may be given an obscene connotation by the accompanying words. But it is unlikely that an obscene picture of the naked body will be purified by its caption. In the statute in force at the time of the administrative decision, Congress specified "pictures" as a specific category of obscene item to be barred from the mails.[18] The fact that petitioners choose to accompany obscene pictures with innocuous textual matter does not make such pictures mailable.

2. Some of the pictures were described by the District Court as "vile," "filthy" and "grotesque." Petitioners complain that these were not correct synonyms for the *Roth* standard (Pet. 31). But the *Roth* criterion is a concise expression of a living concept of law, not a formulary, and the substance of that principle was carefully applied by the District Court. Terms such as "vile" and "filthy" appear in

[18] The substitution in 1955 of general terms for the specifically enumerated items in 18 U. S. C. 1461 (69 Stat. 183) did not affect the substantive prohibition against mailing obscene pictures. See Sen. Rep. No. 113, 84th Cong., 1st Sess.

the statute as it is presently worded, and are appropriate to describe those photographs in petitioners' magazines which appeal to a morbid or shameful interest in sex; in context, "grotesque" as used here conveys a similar meaning. In any event, the Court of Appeals considered the matter *de novo* and explicitly concluded that the illustrations in the magazines constitute " 'material which deals with sex in a manner appealing to the prurient interest,' and hence is obscene, as *Roth* tells us." (Pet. 49–50, 53).

3. Petitioners complain further that the Court of Appeals misapplied the *Roth* standard because it did not judge the illustrations in their magazines in the light of their own conduct and intent (Pet. 32). But this is not a criminal proceeding, in which *mens rea* is an element of liability. It is a civil administrative proceeding to determine whether the photographs in petitioners' magazines are mailable. Petitioners' intentions, however well-meaning, do not make their pictures mailable if the pictures' dominant theme—to the average person, applying contemporary community standards, when viewing the pictures as a whole—appeals to prurient interests. The subjective intentions of petitioners' sponsors no more permit them to distribute such pictures in the mails than their sincerity would permit them to advocate their views by parading down Pennsylvania Avenue in the nude. The pictures, no less than the parade, must be objectively judged by the community standard, and not by their own private opinions and views.

III

Petitioners complain that they were denied a fair hearing by the Post Office Department because it refused to consider the evidence they offered to establish contemporary community standards. But we believe that they have no standing to make such a complaint in this case. At the administrative hearing, the only evidence they offered was from the cold record of a hearing which occurred several years before in a proceeding involving numbers of "Sunshine and Health" containing different materials. The Hearing Examiner ruled that such evidence was not relevant to the issue before him. Petitioners offered no testimony whatever on community standards as they related to the matters in the February 1955 numbers of their magazines, and they admitted that they had no such testimony to offer. After the close of the hearing, they again moved to have the record of other proceedings considered, in an ambiguously worded motion which purportedly offered evidence of contemporary community standards (J. A. 57), *supra*, pp. 11–12, fn. 4. But this untimely motion contained no express description of any proffered evidence bearing on the two magazines then before the Post Office Department. Finally, when the question of obscenity was considered *de novo* in the District Court, petitioners made what proved to be a hypothetical offer of testimony bearing not on the two magazines but on the abstract question of nudism in American life and art.

On this record, there is no occasion for this Court to resolve what petitioners term a major due process

issue—whether expert evidence of contemporary community standards must be received by the trier-of-fact in an obscenity case. Such is the uncertainty of the social sciences in the measurement of community behavior (see Frank, J., concurring in *Roth* v. *Goldman*, 172 F. 2d 788, 795, (C. A. 2)), that it is at least doubtful that evidence of this type *must* be received as a matter of due process. The admissibility of such evidence is a question of policy about which there is wide dispute. See American Law Institute, Model Penal Code, Tentative Draft No. 6, comments on Sec. 207–10. The present record does not lay a proper foundation for consideration of the issue here since it discloses only ambiguous and hypothetical offers of evidence obviously infected by irrelevant materials.[16]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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[16] Petitioners include in their argument an exposition of the procedures which they think the Post Office Department would prefer. The Department's desire for fairness in mailability proceedings is reflected more accurately in the recently published regulations, 22 F. R. 8999, which embody the experience of petitioners' case, than in petitioners' speculations about the Post Office Department's preferences.

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